Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1978

No. 78-132

SOLBORO KNITTING MILLS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, SOLBORO KNITTING MILLS, INC., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit issued in this case on March 8, 1978, insofar as and to the extent that decision granted the application of the National Labor Relations Board (the "Board") to enforce its order herein dated January 7, 1977.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix, *infra,*), modifying the decision of the National Labor Relations Board, is reported

at 97 LRRM 3047, but, as of the date of this Petition, has not been officially reported. The Judgment of the Court of Appeals (App., *infra,*) was filed on April 25, 1978. The Decision and Proposed Order of the Administrative Law Judge and the Decision and Order of the National Labor Relations Board affirming in part and modifying in part his decision and recommended order (App., *infra,*) are reported at 227 NLRB 738.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

Questions Presented

1. Whether Solboro was properly ordered to bargain on demand, with Local 107, ILGWU; where the Board failed to explain whether and why present conditions are still so "contaminated by Solboro's alleged unfair labor practices as to prevent the holding of a fair and untrammeled election among the employees to decide whether or not they wish to be represented by Local 107," despite the passage of time and large turnover of employees since the occurrence of those alleged unfair labor practices.

2. Whether the Board could find that the petitioner had violated section 8(a)(5) of the National Labor Relations Act, 29 USC § 158(a)(5) [i.e. had failed to bargain in good faith with Local 107, on demand] where no such violation had been charged against the Company, nor litigated, nor found by the Board's Administrative Law Judge.

3. Whether statements not authorized by petitioner, and which were made by an employee of petitioner who was not a supervisor, were nevertheless attributable to petitioner, so that petitioner could be found to have violated §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 USC §§ 158(a)(1) and (3), by virtue thereof.

Statutes and Regulations Involved

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USC §§ 151 et seq. are the following:

National Labor Relations Act §2(11), 28 U.S.C. §152(11):

Definitions

Sec. 2. When used in this Act—

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

National Labor Relations Act §7, 28 U.S.C. §157:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other con-

certed activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

National Labor Relations Act §§8(a)(1), (3) and (5) 29 U.S.C. §§158(a)(1), (3) and (5):

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority

of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organiaztion (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership:

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Rules and Regulations of the National Labor Relations Board, 29 CFR §§ 102.15 and 102.17:

Complaint

§ 102.15 When and by whom issued; contents; service—After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where

known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

* * *

§ 102.17 Amendment—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

Statement of the Case

A. *Background*

Petitioner, Solboro Knitting Mills, Inc. (herein "the Company", or "Solboro") is a New York corporation engaged in the manufacture of knitted sweaters. Murray Harkavy, president, and Rita Harkavy, secretary-treasurer, manage the Company and supervise its daily operations.

During the 1974 fall season, the Company employed approximately thirteen employees to operate its machinery and perform related unskilled tasks. The employer-employee relationship at Solboro is informal. The Secretary-Treasurer of the Company spends her day at the plant, in the shop, personally directing the production force, actually assisting in the work herself, alongside the other employees (e.g., R.356, 388, 471, 920).[1] She has constant

1. "R" references are to pages of the printed Record, i.e., the Appendix in the Court of Appeals, which Petitioner has requested that Court to certify and transmit to this Court.

contact with her employees regarding their work (A.920); she frequently asks employees, especially the older employees, "Whats going on" (R.471, 480, 968).

The Company's operations are seasonal. Business conditions in the apparel industry were depressed in the fall of 1974, and the Company's shipments or orders were already dwindling (R.794-797) when the Company received a telegram on September 30 cancelling a complicated, labor-intensive Sweater-Bee order. Less than one week earlier, the Company was told by its accountant that it had lost $15,000 during the previous year.

Just a few days later, Union representative Gaspar Sciacca came to Mr. Harkavy claiming that Local 107, ILGWU, represented a majority of his employees.

Mrs. Harkavy inquired of Anna Nemec why she had not told her about the Union campaign. Later that day, Mr. Harkavy addressed the employees assembled in the shop.

He said he understood that some of the people wanted to be represented by the Union. He then spoke of the general economic situation of the Company and the industry, that expenses would rise due to Union benefits, that a major order had been cancelled, that he had just been told by his accountant that the Company had lost $15,000 for the previous fiscal year, that Hong Kong competition was on the rise, and finally, that he didn't see how Solboro could survive if all these economic conditions persisted or if there were an additional economic expense. He told his employees that it was their decision to make, but that he wanted to make them aware of the Company's and the industry's financial condition (R. 798-90, 845-47).

Mr. Harkavy's recollection was corroborated by every employee who testified about the speech, including witnesses for the Union who were found "very impressive" by the finder of fact. (R.330, 532-33, 567-68, 764-67, 622, 629-30, 37, 4, 655).

Nevertheless, the Board found that the employees could reasonably have inferred that the Company had threatened plant closure for their support of the Union, in violation of §8(a)(1) of the Act, a finding affirmed by the Court of Appeals.

The Board, with Court approval, also found that Solboro violated §8(a)(1) of the Act by virtue of anti-union statements and threats to employees attributed to Mrs. Harkavy, and by virtue of Mrs. Harkavy having interrogated employees about their union activities and support.

The record is clear that Solboro's business is seasonal; that the season's end was at hand when the Union arrived on the scene; that the Company's knitting machines were already limited to turning out samples and new designs weeks before the Union's demand for recognition, thus creating the production fall-off which justified the layoffs that followed; that the Company had experienced the cancellation of a major in-production order, the first in its experience, on September 29, just days before the Union business agent appeared; that some employees, by the end of September, were being given make-work, and were either finishing up orders for shipment or already working on material that would stay on the shelf and not be shipped out at all; and that October was a very slow month (R.192, 459-63, 476, 556-57, 627, 680-84, 689, 708-10, 725-29, 792-802 820-24, 835, 869-71, 922, 932-33).

However, the Court of Appeals found ample evidence in the record to support the inferences drawn by the Board that "the layoffs of the four union supporters were expedited on the basis of discriminatory considerations in violation of section 8(a)(3) of the Act", (Appendix, *infra.*) as well as the Board's conclusions that the company refused to reemploy them at the beginning of the next season for the same reasons.

B. Josephine O'Connell

The Board devoted considerable attention to alleged threats, promises of benefit and coercive statements of Josephine O'Connell, who on October 5 began circulating a petition among employees repudiating the Union.

Mrs. O'Connell worked like other employees, at different jobs, including floor work, steaming and packing (R.370, 685, 716). She had no dealings with employees regarding their wages, time off, hiring, firing, or transfers; she had no authority effectively to recommend any of the above such actions; she did not answer questions for employees concerning their work (R.718-720, 908). Rather, O'Connell worked on an hourly basis, and was paid time and a half for overtime (R.717). Her rate of pay, $2.40 an hour (R.717), was even less than the rate for Grace Rugolo, the Union organizer and a recent hire (R.663).

Mrs. O'Connell had no independent authority to issue instructions or directions to employees concerning their work. She could relay instructions to employees, but only those which she received directly from Mrs. Harkavy (R.511, 718, 906). Even those instructions were limited because O'Connell was not competent to tell employees how to do their work (R.977-79).

Mrs. Harkavy specifically told the employees that O'Connell was not a forelady (R.513-515); and contrary to the conclusion of the Board (R.39) and the unsupported assertions of General Counsel in its Court of Appeals brief, the record clearly reveals that the employees did *not* consider her to be a person of authority or an agent of management. For example, Margaret Passannante, one of the alleged discriminatees, testified that she never received instructions from Mrs. O'Connell and never had reason to (R.370). Mary White, another witness for the Board, testified that she received instruc-

tions about her work from no one other than Mrs. Harkavy (R.423). Other employees testified that they knew that Jo O'Connell was *not* a forelady (R.510, 631, 642, 685).

Finally, employees, including witnesses for the Board, consistently testified that whenever Mrs. O'Connell spoke *for* Mrs. Harkavy (known in the shop as Mrs. Murray), she would preface her remarks with words such as: "Mrs. Murray wants you to do this", or "Mrs. Murray said for you to do that" (Carmella Cacoperdo, R.525; Donna Moravec, R.616-17; Julia Delfino, R.682). Mrs. O'Connell also testified that whenever she would relay instructions from Mrs. Harkavy, she would preface her remaks to indicate that the instructions came from "Mrs. Murray" (R.717-18, 749) because this was the easiest way in which she could get employees to respond to those instructions.

The uncontroverted evidence clearly demonstrates that Mrs. O'Connell, who was neither a supervisor nor agent of the Company, undertook to circulate the petition repudiating the Union without the knowledge of the Company; that those employees who signed the petition did so knowledgeably, without being coerced, and of their own free will (Mrs. O'Connell, R.735-38; Donna Moravec, R.583, 602-04; Anna Nemec, R.456, 473-76; Cacoperdo, R.492-93, 515); that Mrs. O'Connell typed the letter herself at home without ever discussing it with management; and that management first learned of the letter, with surprise, when O'Connell showed the signed, *fait accompli* to Mrs. Harkavy (R.737-38, 912, 973-74).

Nevertheless, the Board held that Mrs. O'Connell's activities were attributable to the company and that Solboro violated the Act by virtue of her activities.

C. The § 8(a)(5) Violation

Throughout the entire proceedings before the National Labor Relations Board, at both the Administrative Law Judge level and on review by the Board itself, Solboro was never charged with having violated § 8(a)(5) of the Act.

Nevertheless, at the time of its review of the ALJ's decision, the Board raised *sua sponte* and without prior notice to Solboro, the allegation that it had violated § 8(a)(5). The Rules and Regulations of the Board provide that a complaint may be amended *upon motion*. However, the Board did not comply with its rules and did not give the Company notice of this alleged § 8(a)(5) violation by properly amending the complaint.

The Board itself in its brief to the Court of Appeals, acknowledged that "almost" every element of a § 8(a)(5) violation was litigated. The Administrative Law Judge specifically noted: (a) the absence of any 8(a)(5) against the company contention, (b) that respondent had asserted the inadequacy of the bargaining demand at the hearing, and (c) that while respondent appeared to abandon this position in its brief, the issue was *irrelevant* in the absence of any 8(a)(5) contention (R.49, n. 76).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Second Circuit upholding the order of the National Labor Relations Board requiring petitioner to bargain with the Union is inconsistent with this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) and conflicts with decisions in other circuits inasmuch as the Court failed to require the Board to explain whether any why present conditions are still so contaminated by petitioner's alleged unfair labor practices as to prevent the holding of fair and untrammeled election among the employees, despite the passage of time and large turnover of employees since the occurrence of those unfair labor practices.

It is well established that the preferred method for ascertaining whether a union has majority support is a secret ballot election conducted by the Board through its procedures under § 9(c) of the Act (29 U.S.C. § 159(c). *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 596-7, 602-3 (1969).

Thus, this Court has established two categories of cases where bargaining orders may issue without the holding of an election.

In cases marked by "outrageous" and "pervasive" unfair labor practices, where the Board may issue a bargaining order *without* prior showing of majority support, a bargaining order is appropriate only if the unfair labor practices are of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, "with the result a fair and reliable election cannot be had."

However, the Board may issue a bargaining order requiring an employer to bargain with a Union which has obtained authorization cards from a majority of its employees, in the absence of an election, where an employer

has committed less pervasive independent unfair labor practices which have made the holding of a fair election unlikely. *NLRB* v. *Gissel Packing Co.*, supra.

Of course, there is a third category of cases where less extensive unfair labor practices has occurred. This case should be treated as a "third category" case. Josephine O'Connell's anti-union conduct apparently is the major basis for the Board's finding that the company committed serious unfair labor practices consisting of threats, promises of benefit, soliciting employees to repudiate the union, etc., in volation of section 8(a)(1) (R. 39-41) (Board brief to Court of Appeals at 7-8, 17-21, 41). There is no basis in law or fact for holding that the Company committed unfair labor practices on the basis of conduct of employee Josephine O'Connell (infra, pp. 18-21).

But even if this is characterized as a first or second category case,[2] a bargaining order is inappropriate because the Board failed even to consider whether a free and untrammeled election could have been held at the time the Board issued its order, in view of the seasonal nature of Solboro's business, the high rate of employee turnover (A. 29, 193-235) and the passage of time since the case had arisen,

> "Since it is the present work force that stands to be deprived of exercising its free choice in the preferred election process, the fact that it is substantially different from the one which existed at the time of the misconduct militates against issuance of a bargaining order. . . "

Peerless of America, Inc. v. *NLRB*, 484 F.2d 1108, , 83 LRRM 3000, 3010 (7th Cir., 1973), *NLRB* v. *Gruber's*

2. The Board did not choose to characterize the case as one or the other.

Star Market, Inc., 501 F.2d 697, 87 LRRM 2037 (7th Cir. 1974). But see, contra, *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 94 LRRM 2772 (9th Cir. 1977).

In Gissel the Court made it plain that a bargaining order should be issued only when "the possibility of . . . ensuring a fair election . . . by the use of traditional remedies, though present is slight." 395 U.S. at 614.

Compare, e.g., *M.S.P. Industries, Inc.* v. *NLRB*, 568 F.2d 166, 97 LRRM 2403 (10th Cir., 1977), where it was found that the Board properly refused to enter a *Gissel* bargaining order despite "pervasive" unfair labor practices since certification and a duty to bargain already existed by virtue of an election among employees.

The Second Circuit Court of Appeals failed to remand this case to the Board to consider and make specific finding on this issue, despite the fact that other Circuit Courts of Appeal have done so in similar cases involving seasonal business, high employee turnover and passage of time. *NLRB* v. *American Cable Systems, Inc.*, 427 F.2d 446, 73 LRRM 2913 (5th Cir. 1970) *cert. den.* 400 U.S. 957 (1970), *NLRB* v. *Gibson Products Co.*, 494 F.2d 762, 86 LRRM 2637 (5th Cir. 1974), *Peerless of America, Inc.* v. *NLRB, supra, NLRB* v. *Gruber's Star Market, Inc., supra, Shulman's, Inc.* v. *NLRB*, 519 F.2d 498, 89 LRRM 2729 (4th Cir. 1975), *NLRB* v. *Armcor Industries*, 535 F.2d 239, 92 LRRM 2374 (3rd Cir. 1976). Indeed, the Second Circuit has also recognized this principal in prior cases, though it did not apply it here. *NLRB* v. *General Stencils, Inc.*, 472 F.2d 170, , 82 LRRM 2081, 2084 n.5. (2d Cir. 1972).

As the Fifth Circuit stated in *American Cable Systems, Inc., supra,*

> We think it clear from the foregoing that the Court in Gissel clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election.

Thus the Court remanded the matter to the Board to determine whether the employer's "1965 violation of §8(a)(1) and (3) have a 1970 existence."

The failure of the Second Circuit to require the Board even to consider whether a free election could have been held at Solboro at the time of its bargaining order and to make specific findings with respect thereto, in conflict with decisions of other Circuits and in disconsonance with this Court's *Gissel* decision, should compel the Court to grant certiorari herein.

II.

The decision of the Court of Appeals for the Second Circuit upholding the ruling of the National Labor Relations Board that petitioner violated section 8(a)(5) of the National Labor Relations Act, 29 USC § 158(a)(5), where no such violation had been charged against the petitioner, is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Drug Package, Inc.* v. *NLRB*, 570 F.2d 1340 (1978); operated to deprive petitioner of due process of law; and is inconsistent with the principal that administrative agencies adhere to their own rules.

The Board erred in raising, *sua sponte,* at the time of its review of the Administrative Law Judge's decision, the allegation that Solboro violated section 8(a)(5) of the Act. The Rules and Regulations of the NLRB, section 102.17, state that a complaint may be *amended* by the Board, *upon motion,* at any time prior to the issuance of an order by the Board (emphasis added). In the case at bar, the Board did not comply with its rules: It did not move to amend the complaint, nor did it amend the complaint without

making a motion. Indeed, the Board *never* gave the petitioner any notice that a section 8(a)(5) charge was pending against petitioner, or was being considered by the Board, and thus the Company did not have full and fair opportunity to refute this charge. *Compare,* e.g., *Fire Alert Co.,* 223 NLRB 129, 130 n. 5 (1976).

This is not a procedural technicality, because *not* all elements of an 8(a)(5) violation were litigated.[3] The Administrative Law Judge specifically noted: (a) the absence of any 8(a)(5) contention, (b) that respondent had asserted the inadequacy of the bargaining demand at the hearing, and (c) that while respondent appeared to abandon this position in its brief, the issue was *irrelevant* in the absence of any 8(a)(5) contention (R. 49, n. 76) (emphasis added). Thus Solboro was in fact denied a full and proper hearing on one major aspect of an 8(a)(5) violation. Respondent did not fully develop its contention as to the inadequacy of the bargaining demand at the hearing, in its brief to the Administrative Law Judge, nor in its appeal to the Board, because at no time was that issue relevant to the charges the Company was on notice to defend.

It is axiomatic that since petitioner was not fully appraised of the charges against it and did not have an opportunity fully and completely to defend itself, petitioner was denied due process. *Sarzen* v. *Gaughan,* 489 F.2d 1076 (1st Cir. 1973). The statements by the Board and the Court that the § 8(a)(5) violation *was* fully litigated are contradicted by the Administrative Law Judge, who was the actual trier of fact.[4]

3. The Board admitted as much by stating in its brief to the Court of Appeals that "almost" every element of the § 8(a)(5) violation was litigated.

4. The ALJ's suggestion that even if fully litigated he would have determined this issue against the Company merely indicates that he had made up his mind before hearing full and complete argument. It indicates greater, not lesser, prejudice to the petitioner by virtue of the conduct of the proceedings.

The Board erred in blindly following the rule from *Trading Port, Inc.,* 219 NLRB 298 (1975). The Board neglects to note that, in contrast to the case at bar, the original charge in *Trading Port* did allege an 8(a)(5) violation. Moreover, *Steel-Fab, Inc.,* 212 NLRB 363 (1974), and *White Pine, Inc.,* 213 NLRB 566, 567, reflected the status of Board law when the complaint against Solboro was served and the matter tried. *Compare,* e.g., *South Station Liquor Store, Inc.,* 223 NLRB 1115 (1976). The policy expressed in those cases, that the injection of "artificial and superfluous" findings of 8(a)(5) violations are not necessary for a bargaining order under the rule of *NLRB* v. *Gissel Packing Co., supra,* should apply to a case where no 8(a)(5) violations are charged. Therefore, while the employer vigorously contends, *supra,* that a *Gissel* order is not appropriate, the Board's finding on the *Gissel* question is not a justification for finding an 8(a)(5) violation where none had been charged or litigated. *Accord, Ellino Halvorson, Inc.,* 222 NLRB 534, at n. 6 (1976).

The decision of the Second Circuit upholding the Board's finding of a §8(a)(5) violation in these circumstances, conflicts with the decision of the 8th Circuit in *Drug Package, Inc.* v. *NLRB,* 570 F.2d 1340, 97 LRRM 2851 (1978). The Eighth Circuit reversed the Board's decision that Drug Package, Inc. had violated §8(a)(5), noting that (a) the complaint, as amended, contained no allegations of an 8(a)(5) violation; (b) that the Administrative Law Judge made no finding of a section 8(a)(5) violation; (c) the exceptions to the Administrative Law Judge's decision filed by the Union as the charging party did not press a claim for an 8(a)(5) violation; (d) the hearing was conducted prior to the Board's decision in *Trading Port.* As the Court therein stated, "Had the Company been given notice of the possibility of an 8(a)(5) violation and the resulting additional

penalties, it might have litigated the matter differently."

The identical factors are present in the instant case. While Solboro faces no "additional" penalties by virtue of the §8(a)(5) finding, that finding is an independent basis for the bargaining order which is "the most serious remedy imposed in this matter" (cf. *Drug Package, Inc., supra,* 97 LRRM 2854) and which Solboro seeks to overturn.

III.

The decision of the Court of Appeals for the Second Circuit upholding the ruling of the Board that petitioner had violated sections 8(a)(1) and 8(a)(3) of the Act rests on an erroneous conclusion of law that statements of a person not a supervisor are binding on petitioner; is in confiict with decisions of the Court of Appeals for the Eighth Circuit and Fifth Circuit; is inconsistent with other decisions of the Board; and is erroneous in failing to require the Board to follow the principle that like cases should receive like treatment.

The Board concedes that Ms. O'Connell was not a supervisor (R. 39, 53). The Board cites not an iota of evidence that employees viewed her as a forelady or management representative—the evidence is to the contrary. There is not a shred of evidence that O'Connell spoke *for* management or that employees thought her statements about union activities originated with management. Nowhere in the record does it appear that Mrs. O'Connell invoked Mr. or Mrs. Harkavy when she made any of her allegedly coercive statements (i.e., p. 6, supra. E.g., R.523). There is no evidence that she acted at the behest of management. There is no evidence that management knew of her activities and statements. Nor is there any evidence that the employees

were led to believe that she was acting on behalf of management in these activities. The Board cities *no* record evidence to support its conclusion to the contrary, which is mere conjecture.

Yet, even in cases where the "nexus" between management and the employee has been substantially *greater* than here, and where the evidence of such a nexus has been substantially more convincing, the Board, with approval of various Courts of Appeal, has held that the employer was not responsible for the anti-union conduct of those employees. *NLRB* v. *Sayers Printing Co.,* 453 F.2d 810, 79 LRRM 2129 (8th Cir. 1971) (Company could not be charged with responsibility for two employees' actions during union election campaign which consisted of threatening loss of employment, loss of bonuses, and discharge, where substantial evidence on record as a whole did not support determination that they were supervisors and record was void of evidence that they acted at request or direction of management). *Stewart & Stevenson Services, Inc.,* 164 NLRB 741, 742-43 (1967), *modified on other grounds,* 414 F.2d 232, 70 LRRM 2719 (5th Cir., 1969), (employees had no power to hire, fire or recommend change in status of employees, worked alongside other employees, and acted merely as a conduit for the foreman when giving orders); *Paoli Chair Co.,* 213 NLRB 909 (1974), (employee received instructions from the overall supervisor, relayed them to the other employees in the lumberyard routinely, and guided them in their work, but had no power to hire, fire, discipline or recommend such action, was hourly paid and did not attend meetings of supervisors, nor responsibly direct any of the other employees or possess any supervisory indicia); *Rowand Co.,* 210 NLRB 95 (1974), (employee relayed routine instructions from foreman to

laborers as a conduit, did not exercise independent judgment nor have authority to impose or recommend discipline of employees, performed the same type of work and received same as other employees, was neither a supervisor nor agent of the Company); *Western Sample Book & Printing Co.,* 209 NLRB 384 (1974). (employee was not closely allied with management, nor intimately involved in effectuating policies, was merely a senior experienced employee, was considered a supervisor by only one employee, and two of Board's witnesses as well as Company General Manager considered him rank and file); *Redwood Construction Co.,* 192 NLRB 15 (1971). (Company not responsible for anti-union activities of two employees who subsequently advised office manager, an admitted supervisor, who remained silent concerning the incidents: This was not ratification by Company, making it liable for employee's activity. They were not agents of Company within the meaning of the Act. Employees did not hold themselves out as spokesmen for Company. Conduct of two employees was neither authorized nor ratified.)

Thus, Solboro should not have been held responsible for circulation of the "deauthorization" petition.

As the Second Circuit has said in a previous case,

> While the Board has wide discretion in framing remedies, the agency has a correlative duty to explain its imposition of a remedy in one case and its failure to do so in a seemingly similar—or even stronger one on a basis reviewing courts can understand.

NLRB v. *General Stencils, Inc.,* 438 F.2d 894, 905, 76 LRRM 2288 (2d Cir. 1971).

However, in this case, that Court has indeed "abdicated the conventional judicial function," which includes "prevent [ing] capricious determinations by administrative agencies"

by failing to require the Board to explain its conflicting determinations, to the prejudice of petitioner. *Id.; Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490 (1951).

Conclusion

For the reasons set forth above, the petition should be granted.

Dated: Mineola, N. Y.
June 16, 1978

MARTIN H. SCHER, Esq.
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Of Counsel

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-132

SOLBORO KNITTING MILLS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

Opinion of the United States Court of Appeals—Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 235—September Term, 1977.

(Argued December 1, 1977 Decided March 8, 1978.)

Docket No. 77-4081

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—and—

LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Intervenor,

—against—

SOLBORO KNITTING MILLS, INC.,

Respondent.

Before:

MOORE and GURFEIN, *Circuit Judges*;

BONSAL, *District Judge.**

Petition to enforce an order of the National Labor Relations Board which found that respondent had violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, and which ordered, *inter alia,* (1) that respondent offer reinstatement with backpay to the dis-

* Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

criminatees, and (2) that respondent must bargain collectively with the union upon request.

Order enforced as modified.

ERIC GRAY MOSKOWITZ, Esq., Washington, D.C. (National Labor Relations Board, Paul J. Spielberg, Deputy Assistant General Counsel, John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, of counsel), *for Petitioner.*

MAX ZIMNY, Esq., New York New York (Lester Kushner, Sandra M. Nathan, of counsel), *for Intervenor.*

MARTIN H. SCHER, Esq., Mineola, New York (Bruce R. Millman, of counsel), *for Respondent.*

MOORE, *Circuit Judge:*

Respondent Solboro Knitting Mills, Inc. ("Solboro") is a small company in Oakdale, New York, which engages in manufacturing knitted sweaters. The company's operations are, for the most part, seasonal, and its day-to-day business is supervised by Murray Harkavy, the president of the company, and his wife, Rita, the secretary-treasurer of the outfit, who often performs production work on the floor. During the summer of 1974, against the backdrop of a depressed market (with dwindling sales), several of Solboro's thirteen employees, all of whom work in production, decided to look into the merits of union membership. They

were apparently spurred on by long-time union member Grace Rugolo, who was first employed by the company for its 1974 season. Rugolo suggested to her co-workers that their complaints of poor working conditions might be remedied by concerted action. When the workers indicated an interest, Rugolo contacted the International Ladies' Garment Workers' Union Local 107.

By October 4, 1974, nine of the thirteen employees had signed cards authorizing the union to represent them for collective bargaining. That morning, two union representatives visited the company office and demanded recognition for Local 107, claiming that it represented a majority of the employees. Mr. Harkavy told the union agents to either make an appointment to see him later, or to send a letter. The union did so the same day, confirming, by telegram, the earlier visit and offering to prove the union's majority status. The Harkavys never replied. Rather, they resisted the unionization by means which resulted in the instant case.

After Local 107 complained to the National Labor Relations Board ("the Board"), charges were filed against Solboro. Administrative Law Judge Irving M. Herman ("the ALJ"), after conducting hearings in February and again in October 1975, issued a thorough and detailed decision on December 30, 1975, finding that Solboro had violated section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), by having coercively interrogated and threatened various employees and having offered promises of benefits to induce them to repudiate their union commitments. Further, the ALJ found that Solboro had prematurely terminated four of its employees

because of their union activities, and had refused to rehire them when the 1975 season was under way, all in violation of section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3). To remedy the unfair labor practices, the ALJ recommended that Solboro be ordered to offer reinstatement to the four employees so wronged, and to compensate them by means of backpay for earnings they would have received had they worked through the 1974 season and had they been rehired on the date they requested to be re-employed for the 1975 season. The latter computation was determined in recognition of the company policy to re-employ satisfactory workers who, at the beginning of a new season, actively indicate a readiness to be rehired. Additionally, the ALJ recommended that Solboro be ordered to bargain collectively with the union upon request, in accordance with *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

The Board adopted the findings and conclusions of the ALJ with two modifications: first, with respect to the propriety of the bargaining order, the Board agreed that the conduct violative of sections 8(a)(1) and 8(a)(3) of the Act supported such a remedy; however, as additional justification, the Board unanimously held that, although there had been no allegation in the complaint of a violation of section 8(a)(5), which prohibits refusals to bargain with a majority union, the conduct of the Harkavys found to have violated other provisions of the Act constituted a violation of the uncharged provision as well. The second modification related to the backpay remedy: although two Board members agreed with the ALJ that no backpay was due for the period before the discriminatees themselves initiated a request for re-employment for the new season,

a majority of the Board found that the violation actually occurred when Solboro first opened its 1975 season, during the week of May 17, 1975. At that time, according to the majority, Solboro, which had wrongfully discharged the discriminatees, was under a duty to offer reinstatement. Thus, backpay was to be awarded from May 17, 1975 until valid offers of reinstatement were made.

The Board now seeks to enforce the order as modified. Insofar as the Board's order affirmed the ALJ's findings that Solboro violated the Act, we agree that substantial evidence supports those findings; issues of credibility, on which the employer's motivations had to be determined, were explicitely resolved on the record, and supportable inferences were drawn. We thus briefly summarize the violations before turning to what we consider to be the more difficult issue, *i.e.*, the calculation of the backpay award.

The Section 8(a)(1) Violations

The Harkâvys' campaign against the unionization started immediately after the union representatives visited the Solboro plant on October 4, 1974. Within minutes after the agents were sent away, Mrs. Harkavy called employee Anna Nemec into her office to ask what she knew about the unionization efforts. Nemec, who apparently had been on friendly terms with Mrs. Harkavy, as were many of the workers in the informal setting of Solboro, admitted to Mrs. Harkavy that she had not said anything about the matter earlier because she supported the union. According to Nemec's credited testimony, Mrs. Harkavy concluded the questioning session by advising Nemec not to "mention this to anyone".

Shortly thereafter, Mrs. Harkavy reportedly approached a group of employees and inquired whether "you girls want the Union?" When no one responded, Mrs. Harkavy stated: "I see you girls don't want your jobs".

These two incidents of questioning were found to constitute coercive interrogation. It followed closely on the heels of the visit to the plant by the union agents; it was not accompanied by an explanation of its purpose nor by any assurance against retaliation. We think that the ALJ properly found that the questioning thus constituted an unfair labor practice within the requirements of *Struksnes Construction Co.,* 165 N.L.R.B. 1062 (1967) and *Bourne* v. *NLRB,* 332 F.2d 47, 48 (2d Cir. 1964).

Similarly coervice was the next action taken by management to quash the unionization sentiment. That same day—the day of the union demand for recognition—Mr. Harkavy assembled all of the workers to inform them of the union agent's visit and to discuss the financial condition of the company. Mr. Harkavy had recently received a telegram cancelling a complicated order for which materials had already been purchased. To make matters worse, the company's accountant had just informed the Harkavys that Solboro had lost some $15,000 during the preceding year. Obviously, the threat of union demands compounded Mr. Harkavy's fears, and precipitated the speech that he was then to make. He told the workers that he did not see how the company could survive if economic conditions persisted or if there were additional economic expense. Although there was conflicting evidence as to whether the remarks were limited to predictions of financial condition or whether the remarks were directed to threatening plant closure in

the event of a union victory, we think that the ALJ was on firm ground when he found that Mr. Harkavy's speech was violative of the Act in that the workers could reasonably have inferred that the threats were directed toward their decision to join the union *See NLRB* v. *Kaiser Agricultural Chemicals,* 473 F.2d 374, 381 (5th Cir. 1973). As the ALJ noted, "[a]n employer who goes so close to the brink takes the risk that employees may honestly misunderstand him". *NLRB* v. *Rollins Telecasting, Inc.,* 494 F.2d 80, 82 (2d Cir.), *cert. denied,* 419 U.S. 964 (1974). Mr. Harkavy could have chosen his words more carefully, and explicitly avoided the likelihood of being misunderstood by adding, as the ALJ suggested, that Solboro wouuld "not close simply because of a [union] victory but only if the Union's demands made continuation impracticable". (Appendix at 37-38). Under the circumstances, we decline the invitation to substitute respondent's view of the evidence for that of the ALJ.

O'Connell's Conduct

The ALJ also found that the conduct of employee Josephine O'Connell in attempting to dissuade the workers from joining the union was to be attributed to the Harkavys. O'Connell was being trained to be a "forelady" at the plant. Accordingly, she relayed messages from Mrs. Harkavy to the other workers, and was considered to speak with some degree of authority. On Saturday, October 5, 1974, the day after the union presented its demand, O'Connell drafted and signed a letter to the union representative, stating: "We the undersigned have discussed your offer and have decided to withdraw our signatures. We do not

wish to be represented by the International Ladies Garment Workers Union".

O'Connell then obtained the signatures of three of her follow employees, explaining to the co-signers that she was going to give Mrs. Harkavy a copy of the letter. The ALJ credited testimony to the effect that the reason that O'Connell undertook the task of writing a letter of repudiation was that "the boss had been very good to [her]". He found, too, that Mrs. Harkavy had had prior knowledge of the letter—that she was "expecting it" when it was delivered to her on Monday, October 7. On that day, employee Cacoperdo, who had been one of the co-signers of the repudiation letter, had driven to work with O'Connell. During the ride, they discussed the union campaign and the import of the letter of repudiation. O'Connell was found to have "promised" Cacoperdo that "we'll be taken care of, that we'll always have a job and we'll get a raise". Later that day at work, O'Connell spoke to Cacoperdo and told her that Mrs. Harkavy would take no more orders "until everything is straightened out with the union". O'Connell added that, in her view, Mrs. Harkavy would "rather close the shop than have the Union in". Although there were conflicting reports as to whether the two statements offered by O'Connell had indeed come from Mrs. Harkavy, the ALJ found sufficient evidence on which to base a holding that Cacoperdo had "gained the impression that O'Connell's statement that the plant would close reflected Respondent's position". (Appendix at 41). Although OConnell was not a "supervisor" within the meaning of the Act, Solboro was held liable for her conduct "on an agency theory", (Appendix at 39), pursuant to

NLRB v. *Dayton Motels, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973), in which it was held that the acts of non-supervisory employees can be imputed to the employer if the employees in question have close ties with management, as where they "customarily [deliver] to other employees work instructions from management", and particularly where the employer acquiesces in the anti-union efforts of the employee-agent.

Although the question is one susceptible of argument, we think that substantial evidence supports the ALJ's finding in this case. The Solboro employees were aware that a special relationship existed between O'Connell and Mrs. Harkavy. The employees' belief that O'Connell spoke —at least on the topic of unionization—with the authority of management "could only have been fortified by O'Connell's telling her cosigners that she would deliver to Mrs. Harkavy a copy of her letter to [the union agent], as well as by Mrs. Harkavy's statement to [employee] Nemec that she had done 'the right thing' in signing that letter". (Appendix at 39.) On the whole, the inference that O'Connell solicited the employees to repudiate their union commitments with the blessing and support of management was properly drawn. We uphold the Board's finding on this point, even though we think that the bargaining order can be sustained even without attribution of O'Connell's conduct to the Harkavys. The coercive anti-union conduct discussed above was sufficient to support the order under the circumstances of this case, especially since the order was predicated not only on the section 8(a)(1) violations, but also upon the section 8(a)(3) violations, which we now discuss.

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THE SECTION 8(a)(3) VIOLATIONS

Employee Margaret Passannante began working for the company in September 1974, and was given a wage increase the day after she was hired. On October 3, 1974, the day before the union demand, Passannante asked permission to be absent on the next day. Mrs. Harkavy agreed, telling Passannante, "see you Monday". On October 4, shortly after Mr. Harkavy's "speech" to the workers, Mrs. Harkavy phoned Passannante and told her that there would be no more work for her; when she came to pick up her paycheck a few days later and asked when more work would be available, Mr. Harkavy responded with the statement that he would "see when we straighten this out". (This statement was found also to have constituted a violation of section 8(a)(1) insofar as it was intended to restrain Passannante and others from exercising their union rights). The Harkavys told Passannante to "keep in touch" about further work. There was testimony that, after the layoff, Mrs. Harkavy herself operated the machine that Passannante had operated in order to finish the work under production.

Employee Mary White was hired on August 27, 1974. On October 7, after she had completed work on the labeling machine, Mrs. Harkavy told her that there was nothing more to do. The same fate befell employees Grace Rugolo and Donna Moravec. Rugolo was hired in July 1974 and received a wage increase about a week after she began work. Moravec began in May and was given a raise in July. On October 8, Rugolo and Moravec, along with White and Passannante, both of whom had been laid off already, and another employee who was still at work, attempted to

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distribute union leaflets at the company's drive-way; they were accompanied by two union agents. All were wearing union buttons. Mr. Harkavy drove up and told the union agents to leave. Mrs. Harkavy, after asking Rugolo whether it was legal to wear the union buttons[1] and receiving an affirmative answer, told Rugolo that she did not want union buttons worn in her "house". Before the end of work that day—which was only four days after the union first appeared on the scene—Mrs. Harkavy dismissed Moravec and Rugolo, with the stated reason that work had run out.

The ALJ rejected Solboro's arguments that the layoffs were motivated by nothing more than normal end-of-season procedure, and that sound economic reasons rather than anti-union animus dictated the layoffs at the time and in the manner they occurred. Although it is true that a large order had been cancelled, there was ample testimony that, in point of fact, there was no real slow-down until the end of October. We are mindful of the fact that an employer's motivation involves, essentially, a question "of inferences of probability drawn from the totality of other facts". *NLRB* v. *Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (2d Cir. 1965). We think that the timing and the nature of the layoffs, occurring, as they did, within days of the union demand, provided strong evidence supportive of the inferences drawn by the ALJ. Although the layoffs were bound to occur at the end of the season, which, in this case, was found to have been at the end of October (although some work continued into November), there is

1. Although charged as a section 8(a)(1) violation, this questioning was not found to be violative of the Act.

ample reason to believe that the layoffs of the four union supporters were expedited on the basis of discriminatory considerations, in violation of section 8(a)(3) of the Act.

Furthermore, the record supports the finding that the Harkavys perpetuated the discrimination by refusing to rehire the four discriminatees when the next season began. It should be noted that the initial charges in this action were filed with the NLRB in October of 1974, and that hearings on the discriminatory layoffs were held in February 1975—before the 1975 season began. However, new charges were filed in September 1975, when the Harkavys' conduct toward the discriminatees after the 1975 season opened suggested that the same anti-union motivations prompted Solboro's refusals to re-employ the four workers then allegedly wrongly discharged. The charges were consolidated, and the hearings were reopened in October 1975, while the initial complaint was pending decision. Thus, the ALJ's findings were forcefully supported by his observations that certain explanations for the denial of rehire, such as general incompetence or other problems in work, were first voiced only after the litigation had begun. Indeed, the only reason given for the dismissals of the employees at the end of the 1974 season was that there was a lack of work.

The 1975 season began in May. At that time, the company recalled some of the more senior employees, including Nemec and O'Connell (on May 12) and Cacoperdo (on June 13). In June, July, and August, the company placed advertisements in the newspaper, requesting various production employees and machine operators and offering training. In the months of June through August, the company hired thirteen new employees, and one more in October.

According to the ALJ's findings, there was no evidence to contradict the testimony of Mrs. Harkavy to the effect that Solboro's "usual practice, on resuming production after a layoff, is not to recall the laid-off employees in the absence of notification of their availability and interest in returning. . . ." (Appendix at 46). Each employee, when laid off at the end of the season, is told to "keep in touch" about re-employment possibilities. According to Solboro's usual practice, satisfactory employees were rehired upon request, assuming the availability of work each new season. (See Appendx at 1026, testimony of Mrs. Harkavy). The ALJ found that each of the four discriminatees, when discharged in 1974, was given the usual send-off. When each of the four sent word, in 1975, however, that she was interested in employment, no offer was made.

Solboro did, in fact, offer employment to Moravec in June 1975. This offer, apparently, was made in response to an inquiry made on Moravec's behalf in March of that year.[2] However, Moravec declined the offer because at that time she was enrolled as a full-time student. Later, on July 14, Moravec did request reinstatement in a letter to Solboro. She did not receive an answer. The reasons given by Mrs. Harkavy at the October 1975 hearings for refusing to respond to the request were not believed by the ALJ. Rather, he believed that the Harkavys, when they made the offer to Moravec in June in response to her case worker's inquiry, had no reason to believe that Moravec's "fidelity to the Union was still intact". (Appendix at 47). But by July, after Mrs. Harkavy had received requests, by regis-

2. See Appendix at 1035. Apparently, Moravec was handicapped, and was represented by a case worker in regard to her initial employment and her re-employment efforts.

tered letter, from the other discriminatees Mrs. Harkavy became convinced, as she testified, that the letters had been "set up" by the union, and that her prior offer to Moravec had been an error. *Id.* Thus, although the Harkavys had employed workers who filled the job that Moravec had performed the previous year (after Moravec had initially declined the offer), that hiring had occurred five days *after* the Harkavys received Moravec's July letter. The ALJ determined that the reason for not wanting Moravec to return to work was not, as Solboro claimed, that the job had been filled but was rather Moravec's "connection with the Union" (Appendix at 48); the discrimnatory act thus occurred upon receipt of Moravec's letter, on July 16, 1975.

As noted, Moravec was not the first of the discriminatees to have been rejected for re-employment after making a written request. On June 23, 1975, Rugolo had written to Mrs. Harkavy stating: "I . . . am ready & able to report back to work. I trust that I will be hearing from you in the near future". On July 1, Mrs. Harkavy sent the following reply: "I received your registered letter Saturday, but I think you know what my answer is going to be". Mrs. Harkavy then alluded to a "vulgar, abusive outburst" that had allegedly occurred the last season, and stated that it was impossible, under such circumstances, to continue the employer-employee relationship. The letter was written, as indicated, *pendente lite*. The ALJ specifically credited Rugolo's testimony that there had been no such incident, and he found that the Harkavys' explanation for denying employment to Rugolo was mere pretext.

White wrote to Mrs. Harkavy on July 15, stating that she had noticed an ad for sewing operators, and that she was willing and able to return to work. White received

no reply. Passannante also wrote to Mrs. Harkavy on July 21, stating: "Your ad for workers has been in the papers for at least 4 wks. I wasn't called and I'm ready and willing to work right now. Please inform". Mrs. Harkavy did not reply.

In both cases, the ALJ refused to conclude that there were only innocent reasons for denying rehire to these employees, who were praised when they performed the previous season. We are convinced that substantial evidence underlies the Board's findings on this point, and commend the ALJ for the thorough and explicit statement of evidence and findings of credibility and of fact. The inferences that were drawn are clearly supportable. We do not sit to hear reargument on the evidence.

The Section 8(a)(5) Violation and the Remedy

The Bargaining Order

As noted above, the ALJ recommended that a bargaining order should issue, as well as a direction for an offer of reinstatement with backpay. The Board adopted the ALJ's recommendations, and agreed that a bargaining order was appropriate under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), which held that an employer may be ordered to bargain with a union, even in the absence of an election, when the union has established majority status by other means as, in this case, the possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes, in cases where other unfair labor practices have been committed which "tend to preclude the holding of a fair election". *Id.* at 595.

In the case at bar, the ALJ found that the unfair labor practices violative of sections 8(a)(1) and 8(a)(3) of the Act were of such a serious and extensive nature that the bargaining order was appropriate. As required by *Gissel* and by *NLRB* v. *General Stencils, Inc.*, 438 F.2d 894 (2d Cir. 1971), reasons were given for recommending the order in this case: the ALJ found that, even absent the section 8(a)(3) violations, the section 8(a)(1) conduct—particularly Mr. Harkavy's "speech" to the employees threatening them with the plant closure—was sufficient in this case to support a bargaining order since the unit is small, and unfair practices "need affect very few employees in order to foreclose a fair and free election". (Appendix at 49).

The Board added another reason to justify the bargaining order: although no violation of section 8(a)(5) of the Act had been alleged, the complaint *had* alleged respondent's failure to recognize and bargain with the union as a violation of section 8(a)(1). In a decision by the Board, *Trading Port, Inc.*, 218 N.L.R.B. 298 (1975), issued between the time the complaint against Solboro was filed and the Board rendered its decision, the Board found that, where an employer refuses to recognize a union that enjoys majority status and subsequently commits substantial unfair labor practices, the employer is guilty of violating section 8(a)(5) of the Act, which prohibits an employer from "refus[ing] to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)". 29 U.S.C. § 158(a)(5). In *Trading Port*, the Board thus found that a bargaining order could be predicated not only on section 8(a)(1) violations, *see Steel-Fab, Inc.*, 212 N.L.R.B. 363 (1974), but on the denial of recognition of the union as well.

Thus, the Board found that, in Solboro's case, the bargaining order was also appropriately entered because, despite the clear union majority as evidenced by the nine union authorization cards—a matter that had been fully litigated in the course of the hearings on the section 8(a)(1) claims—Solboro refused the unions request for recognition.

Solboro argues that the Board erred in considering the section 8(a)(5) violation since none had been charged. It contends that the matter was not, in fact, fully litigated. We disagree. Respondent was charged with refusing to recognize the union on October 4, 1974 and thereafter—in violation of section 8(a)(1). The complaint gave full notice of the claim of misconduct, and it is no denial of due process to predicate an order on a violation, the underlying facts of which have been litigated in full

> "so long as the complaint informs the respondent of the acts which constitute the charged unlawful behavior and respondent is given an opportunity to respond." *NLRB* v. *Scenic Sportswear*, 475 F.2d 1226, 1227 (6th Cir. 1973).

That the matter of a proper demand for bargaining was fully litigated is made clear by the ALJ's addition of a footnote to his findings, see Appendix at 49 n.76, in which he stated that respondent had contested the sufficiency of the demand for bargaining but that, since no section 8(a)(5) violation had been alleged, had not argued the matter in its brief. However, the ALJ commented that he would have found the bargaining demand sufficient had the matter been pressed.

We need not be overly concerned with this point, however, because, even in the absence of a finding that section 8(a)(5) was violated by Solboro, we agree, for the reasons given by the ALJ, that the bargaining order was appropriate under *Gissel.*

Reinstatement and Backpay

We also agree with the order requiring an offer of reinstatement to the four discriminatees. There is substantial evidence to support the conclusion that, but for their union sympathies, Moravec, Rugolo, White, and Passannante would have been rehired for the 1975 season after management was made aware that they were available for work. Clearly, each is entitled to backpay from the time of her unlawful discharge in early October 1974 through the end of the 1974 season, found by the ALJ to have been October 31, when all workers would have been terminated in any event.

The problem, however, is with the second period of time, the 1975 season. As is evidenced by the divergence of views among the Board members themselves and the ALJ, the question of the proper calculation is not free from doubt: The ALJ and the Board dissenters thought that no backpay was owing until the date when the individual discriminatee actually requested re-employment for the season, because, with few exceptions, *no* employee was given automatic re-employment without initiating the relationship. The majority, however, was of the opinion that the date of the discrimination should be placed at the opening of the new season for, given respondent's previous acts of discriminatory layoff, the respondent was under a

legal duty to initiate an offer of reinstatement at the earliest possible moment; the date when operations were resumed for the new season would thus mark the date on which backpay would commence running. The majority relied on *Carbide Tools, Inc.,* 205 N.L.R.B. 318 (1973), in which the Board affirmed the finding of an ALJ that, despite the employer's contention that it had never had a policy of recalling laid-off workers, the wrongdoing employer had the affirmative duty to recall and reinstate workers who had been discriminatorily discharged. In the case at bar, the Board noted, despite Solboro's policy of not initiating the recall of previous employees, there was testimony that, on rare occasion, the employer departed from that practice. Furthermore, the discriminatees would have no basis to believe that their requests would be honored in view of the past discrimination.

In view of the dissenters, *Carbide Tools* was improperly relied upon. There the Board ordered reinstatement of employees with backpay as of the date of their discharge because those employees would have had continuous work had they not been laid off for discriminatory purposes. Rather, the dissenters, disclaiming that they would create a "seasonal industries exception" to the general reinstatement and backpay rules long followed by the Board, stated that company policy, in this case as in others, should control, because the policy was determinative of the entitlement to employment. For support, they cite *Temperature Systems Corp.,* 195 N.L.R.B 1023 (1972), wherein the Board found that an employee hired only for the duration of one particular job was discriminatorily discharged prior to completion of the job. The Board did not, how-

ever, order reinstatement "since [the discriminatee's] employment would have been terminated upon completion of the . . . job. We accordingly limit backpay to the date Respondent completed [the particular job]."

Solboro argues that *Temperature Systems* is to the point: As in that case, where a discharged employee would have been terminated at some time in any event, the Solboro employees were hired only for the duration of a period of time during which work is available. At the end of that time, they are, despite any terminology to the contrary, terminated. They have no absolute right of recall, and furthermore, no expectation of recall unless they initiate the relationship. Thus, argues Solboro, the Board erred in awarding backpay as of the beginning of the 1975 season for at that time, the discriminatees had not sought work. Indeed, the ALJ found, on the basis of uncontradicted testimony, that (1) the company policy was to offer employment only when a former satisfactory employee applied, and (2) all of the discriminatees were told, in accordance with that policy, to "keep in touch" in regard to further work. (See Appendix at 27, 46). He further found, on the basis of the company's policy, that no violation of the Act had occurred until Solboro refused to hire the discriminatees in 1975 after they applied for work. The violation that had occurred the previous fall was not one that continued past the normal termination date. Thus, the remedy should reflect the unique nature of seasonal employment by giving effect to the employer's longstanding and legal hiring practices. To hold otherwise would be to place the discriminatees in a position of superiority vis-à-vis the other employees; it would not restore the *status quo ante*,

which is the extent of the Board's remedial authority. *See* NLRB 1. Remington Rand, Inc., 94 F.2d 862, 872 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938). To enforce the Board's order would be to presume that the employer, who had admitted no wrongdoing and who normally relied on a sound business practice of awaiting applications before seeking out employees at the start of each season, should have presumed itself guilty of a wrong and pursued a wholly new practice, seeking out persons for more favorable treatment than that accorded to all former employees.

We are mindful that the authority of the Board to create appropriate remedies entails great latitude, subject only to limited review in cases where the remedy ordered by the Board does not serve to effectuate the policies of the Act. *See Phelps-Dodge Corp.* v. *NLRB,* 313 U.S. 177, 194 (1941); *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 216 (1964). Nevertheless, we believe that the Board's order in this case must be modified, for it has never been the policy of the Act to force an employer to abandon *legal* hiring practices.

In a recent analogous case before this court, *Florsheim Shoe Store Company of Pittsburgh* v. *NLRB,* 565 F.2d 1240 (2d Cir. 1977), we set aside the remedial portion of an order of the Board which had required reinstatement of part-time employees because there was insufficient evidence on which the Board could have concluded that the part-time employees would not have been phased out in any event, as was argued by the employer. Reinstatement could not be ordered, we said, if the wronged employees would have otherwise been lawfully discharged, pursuant to a sound business decision of the company involved. *Id.* at

1247. (Nor would backpay be appropriate, therefore, for the period after which the discriminatees would have been discharged.)

The gist of *Florsheim* is that, in framing a remedial order, the Board must take into consideration valid and honestly invoked business policies of the employer, and must make and act on finding "as may be required to frame a remedial provision that will, without impairing [the company's] right to make legitimate business decisions, so far as feasible recreate the situation that would have followed" if there had been no discriminatory conduct. *Id.*

We think that the ALJ made those finding in this case. A valid hiring policy was found to exist. Had there been no discriminatory layoff in 1974, all the employees would have had to have made known their interest in employment before an offer of employment would be made. The policy was applicable to all employees, and there was no evidence that the policy itself constituted an unfair practice.

We do not profess to create a "seasonal industries exception" to the general rule that a wrongdoing employer must shoulder the burden of initiating reinstatement. Rather, we give effect to the policy of this company, which may not be the policy of other seasonal employers and which is not in itself ilegally motivated. We therefore hold that the four discriminatees in this case were not illegally out of work until they sought it for the 1975 season. Thus, they should have been reinstated at that time, and they are owed backpay as of that time.

Aside from the backpay owing to the discriminatees for the period between their illegal discharge in 1974 and the end of the 1974 season—found to be October 31—backpay

should be computed as follows: White, Passannate, and Rugolo—all of whom wrote to Solboro in June and July—are to be awarded such backpay as may be appropriate[3] as of the date their letters were received by Solboro. Moravec, however, requested rehire, triggering the employer's obligation, in March 1975. Although operations commenced the week of May 17, 1975, Solboro did not make an offer to Moravec until June. Thus, she was unlawfully barred from working between May 17 and the date of her offer in June, and should be awarded backpay for that period of time. Additionally, she was denied rehire, for impermissible reasons, as found by the ALJ, after she wrote to the company on July 14, 1975. Thus, she is entitled to backpay for the period beginning with that date.

Order *enforced* as so modified.

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3. Pursuant to *F.W. Woolworth Co.*, 90 N.L.R.B. 289 (1950), and *Isis Plumbing & Heating Co.*, 138 N.L.R.B. 716 (1962).

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Intervenor,* v. SOLBORO KNITTING MILLS, INC., *Respondent.*	No. 77-4081

BEFORE: MOORE and GURFEIN, Circuit Judges, BONSAL, District Judge.*

THIS CAUSE came on to be heard upon an application for enforcement of an order of the National Labor Relations Board dated January 7, 1977, against Respondent, Solboro Knitting Mills, Inc., Oakdale, New York, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on December 1, 1977, and has considered the briefs and transcripts of record filed in this cause. On March 8, 1978, the Court, being fully advised in the premises issued its decision granting enforcement of the Board's said order, as modified. In conformity therewith, it is hereby

* Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Judgment

ORDERED AND ADJUDGED by the Court that Respondent, Solboro Knitting Mills, Inc., Oakdale, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating any of its employees concerning their union activities, views or sympathies, or those of their fellows.

(b) Threatening any of its employees with loss of jobs or plant closing or withholding of work if they choose Local 107, International Ladies' Garment Workers' Union, AFL-CIO (hereinafter called the Union), or any other labor organization as their bargaining representative.

(c) Promising benefits to any of its employees to undermine their support for the Union or any other labor organization.

(d) Soliciting any of its employees to withdraw from the Union or any other labor organization.

(e) Laying off, denying rehire to, or otherwise discriminating against any of its employees because of their union activities.

(f) Failing and refusing to recognize and bargain collectively, upon request, with the Union, as the exclusive representative of its employees in the appropriate unit described below. The appropriate unit is:

All production and maintenance employees of Respondent, employed at its Oakdale plant, exclusive of office clericals, guards and supervisors as defined in Section 2(11) of the Act.

(g) In any other manner interfering with, restraining or coercing any of its employees in the

exercise of their rights under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act.

(a) Offer rehire to and make whole Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo for any loss of pay suffered by reason of their premature layoff and denial of rehire in the manner set forth in the opinion of this Court.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, such payroll records, social security records, timecards, personnel records and reports, and other records, as are necessary to analyze and compute the amount of backpay due to the employees named in paragraph 2(a) *supra*.

(c) Upon request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the above described appropriate unit, and embody in a signed agreement any understanding reached.

(d) Post at its place of business in Oakdale, New York, copies of the attached notice marked "Appendix". Copies of said notice, on forms provided by the Regional Director of Region 29 of the National Labor Relations Board (Brooklyn, New York), after being duly signed by an authorized representative of Respondent, shall be posted by Respondent, upon receipt thereof, and be maintained by it for a period of 60 days thereafter, in conspicous places, including all places where notices to employees are customarily

posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED that no costs shall be recovered by either party.

HOWARD P. MOORE
Judge, United States Court of
Appeals for the Second Circuit

MURRAY J. GURFEIN
Judge, United States Court of
Appeals for the Second Circuit

FILED: April 25, 1978

Decision and Order of the National Labor Relations Board

227 NLRB No. 89

MFJPW
D—1924
Oakdale, N.Y.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

SOLBORO KNITTING MILLS, INC. and LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL—CIO	Cases 29—CA—4058 and 29—CA—4571

Decision and Order

On December 30, 1975, Administrative Law Judge Irving M. Herman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, General Counsel filed cross-exceptions and a supporting brief, Charging Party filed a brief in reply to Respondent's exceptions, and Respondent filed a brief in reply to General Counsel's cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

Decision and Order of the National Labor Relations Board

The Administrative Law Judge found that Respondent unlawfully interrogated, threatened, and promised benefits to employees and circulated a petition of defection from the Union in violation of Section 8(a)(1); and prematurely laid off and thereafter denied reemployment to Margaret Passannante, Mary White, Donna Moravec, and Grace Rugolo, in violation of Section 8(a)(3) of the Act. In view of such unfair labor practices, the Administrative Law Judge held that the holding of a fair election was precluded and that Respondent's unfair labor practices warrant issuance of a bargaining order.

We find, in agreement with the Administrative Law Judge, that a bargaining order is warranted. However, we do so for the additional reason that, as alleged in the complaint, Respondent, on or about October 4, 1974, refused and has continued to refuse to recognize and bargain collectively with the Union as representative of Respondent's employees, in violation of Section 8(a)(1).

In addition, we find Respondent's conduct also violated Section 8(a)(5), notwithstanding the absence of an 8(a)(5) allegation in the complaint. The complaint alleges only that Respondent's refusal to recognize and bargain with the Union as representative of its employees is violative of Section 8(a)(1). Such conduct is not alleged as an 8(a)(5) violation. Where, as here, conduct supportive of an 8(a)(5) finding is fully litigated in the course of establishing an 8(a)(1) violation, we find that, in order to effectuate the purposes and policies of the Act, a finding that Section 8(a)(5)was also violated is warranted. As found by the Administrative Law Judge, authorization cards had been signed by 9 of the 13 employees in the appropriate unit prior to October 4, 1974, the date the Union claimed major-

ity status and made an oral request for recognition. At that time, Respondent indicated that it did not wish to be disturbed. When Respondent suggested that the Union make a written request, the Union promptly complied with the Respondent's request but Respondent failed to answer. Following the recognition demand on October 4, 1974, Respondent engaged in unlawful threats, interrogations, and discriminatory layoffs.

In view of the foregoing, we find that Respondent, by refusing to recognize or bargain with the Union on or after October 4, 1974, and by embarking instead upon a course of unfair labor practices designed to destroy the Union's majority status and preclude the holding of a fair election, violated Section 8(a)(1) and that such conduct also violated Section 8(a)(5) of the Act.

While we are in agreement with the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) by denying reemployment to Margaret Passannante, Mary White, Donna Moravec, and Grace Rugolo because of their support for the Union, we also find, contrary to the Administrative Law Judge and our dissenting colleagues, that such violations occurred at a time antecedent to the Respondent's receipt of the individual discriminatees' written requests for reinstatement.

The Administrative Law Judge found that Respondent unlawfully laid off the discriminatees in October 1974, and further discriminated against them when it refused their applications for reinstatement in the summer of 1975. He found no discrimination, however, in Respondent's failure to recall the discriminatees during the week ending May 17, 1975, when Respondent began hiring or recalling other laid off employees. Such finding, however, places the burden on

the discriminatees to initiate requests for reinstatement, thereby enabling Respondent to profit from its own wrongdoing should the discriminatees fail to make a prompt request seeking reemployment or should Respondent not receive such request because of a delay in mail deliveries, or for whatever reason. Neither the Administrative Law Judge nor the dissent have cited precedent for such departure from the purposes of the Act.

The Administrative Law Judge found that, "Absent evidence to contradict Mrs. Harkavy's testimony that Respondent's usual practice, on resuming production after a layoff, is not to recall the laid-off employees in the absence of notification of their availability and interest in returning, and in view of the employees' testimony that they were told to 'keep in touch,' I find no violation in any failure to recall prior to receipt of the written request therefor." Clearly, the adoption of such a finding by our dissenting colleagues ignores the fact that it is Respondent who violated the Act and it is also contrary to Board precedent in this area.

The Board has long held that when an employer unlawfully discharges an employee, it is incumbent on that employer to offer such discriminatee reinstatement.[1] Thus, the burden clearly rests on the employer to initiate the action of reinstating an employee who would have continued his employment but for the employer's unlawful conduct. However, our dissenting colleagues now find that seasonal industries constitute an exception to such rule. Such a holding places the discriminatee in a seasonal operation in no better position than a new employee, i.e., he must make known his availability by notifying the employer who dis-

1. *Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 169 N.L.R.B. 627 (1968).

criminated against him. We find this holding contrary to the purposes and policies of the Act, since the discrimination and its results are no less real or more tolerable because they occur in a seasonal operation.

In a case similar to the one herein and involving the unlawful discharge of employees allegedly for economic reasons, *Carbide Tools, Incorporated,*[2] the Board affirmed an Administrative Law Judge's finding that, notwithstanding the employer's contention that it had never had a policy of recalling laid-off employees, such employment policies were inapplicable in the case of discriminatorily laid-off employees. As the employer had an obligation to reinstate the discriminatees, a necessary part of that obligation is the burden of notifying the employees of the opportunity for reinstatement.[3] That obligation is neither suspended nor discharged by the fact that the season may have come to an end after the discriminatory layoffs or by operation of Respondent's normal, if indeed it was normal, policy to require an application for employment in the next season. The discrimination against the employees in one season may well have coerced or restrained the discriminatees from applying for employment in the next season. Until

2. 205 N. L. R. B. 318 (1973).

3. See *Amsterdam Wrecking & Salvage Co., Inc.* v. *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 472 F.2d 153 (C.A. 2, 1973), where the court found that a backpay order was proper although the Board had found that it could not be determined with certainty if the discriminatees would have returned to work sooner if Respondent had not imposed an unlawful condition on their reinstatement, since the discriminatees had previously indicated that they would return to work only if Respondent agreed to recognize the union. Additionally, the court found that "Any doubts regarding the employees' attitudes toward reinstatement properly were resolved against the employer . . . ."

Respondent eliminates such coercive effect by offering the discriminatees employment—which they may refuse—it has not ended or remedied its unfair labor practices. "It rest[s] upon the tort feasor to disentangle the consequences for which it is chargeable from those from which it is immune."[4]

The record shows that, notwithstanding Respondent's professed policy of not initiating the recall of laid-off employees, Respondent admitted that it has not been consistent in adhering to its said past practice since it has, on occasion, recalled laid-off employees. Moreover, the discriminatees had no basis for believing that their requests for reinstatement would have been honored or acted upon favorably, in view of Respondent's denial of some requests and its failure to answer the others. Indeed, in view of the discrimination practiced against them, they had reason to believe their applications would not be acted upon favorably.

The dissent relies on the Company's policy of not initiating the recall of laid-off employees, even to the detriment of the interests of the discriminatees herein and notwithstanding that such finding thwarts the purposes and policies of the Act. It insists that the discriminatees must stand in the same position as the employees who were laid-off when the work ran out. This hardly helps their argument, for even so this case involves unlawful and lawful terminations. Although nothing in the Act compels the Respondent to seek out the lawfully terminated employees to see if they wish reemployment, such an obligation does rest upon it with respect to those employees whose terminations were

4. *N.L.R.B.* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (C.A. 2, 1938), cert. denied 304 U.S. 576 (1938).

unlawful, for else the discrimination against them continues to operate. Nor are we left to mere theory as to the continuing nature of the unlawful discrimination in this case, for when these employees did seek reinstatement, Respondent denied it to them for the same reasons which led it to discriminate against them in the first place. Plainly it would have been futile for the discriminatees to apply for reemployment at the beginning of the season, even if they had had reason to believe, which they did not, that they were no longer *persona non grata* because of their union activities. In our view, as Respondent unlawfully terminated Passannante, White, Moravec, and Rugolo, it necessarily follows that it has the burden of rectifying its unlawful conduct by initiating the recall of the aforementioned discriminatees, notwithstanding the asserted temporary employment of the discriminatees or the seasonal status of the employing industry. It is Respondent who unlawfully disrupted the employer-employee relationship and not the discriminatees. Our dissenting colleagues have shifted the burden of rectifying Respondent's unlawful action from the transgressor to the victims.

Finally, our dissenting colleagues' finding that until the discriminatees communicated their availability and desire for employment to Respondent it could not be put to the test of whether it would rehire them, accords to the discriminatees rights which are no better than those of economic strikers making application to return to work. They profess concern that requiring Respondent to offer reinstatement to these employees would, "because of Respondent's unlawful conduct . . . excuse even a total failure by the discriminatees to request rehire." But that is always so with respect to unlawful discriminatory discharges or

"terminations." The respondent always has the obligation to offer reinstatement. It can, by doing so, cut off its backpay liability if reemployment is refused. This has been the law for the 40 years this Board has administered the Act.[5] We cannot see how there can now be a serious question about this. Law, equity, justice, commonsense, and the record evidence in this case all weigh against the result reached by our dissenting colleagues.

Accordingly, we find that Respondent was obligated to offer to recall discriminatees Passannante, White, Moravec, and Rugolo when work first became available during the week ending May 17, 1975, and we shall order Respondent to offer immediate reinstatement to these discriminatees and to make them whole by the payment of backpay from that date until the date the discriminatees receive a valid offer of reinstatement from Respondent.[6]

Based on the foregoing and the entire record herein, we make the following:

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5. In support of its finding that the discriminatees did not have a superior right to reinstatement and were subject to the same requirements of Respondent's recall policy as the other employees when work became available, the dissent relies on *Temperature Systems Corporation,* 195 N.L.R.B. 1023 (1972), where the Board found that an employer who had discriminatorily discharged an employee before the completion of a particular job for which he was hired, was not required to offer such employee reinstatement, because the discriminatee would have been terminated upon completion of the particular job. We find that decision readily distinguishable from the situation here, where the discriminatees and other employees are usually temporarily laid-off between seasons and Respondent has a policy of rehiring its employees at the beginning of the new season. The discriminatees here have a continuing interest in their employment, subject only to temporary seasonal layoffs.

6. *Fire Alert Company,* 223 N.L.R.B. No. 28 (1976).

Additional Conclusion of Law

Conclusions of Law 5 and 6 in the attached Administrative Law Judge's Decision are renumbered 6 and 7, respectively, and the following Conclusion of Law 5 is added:

"5. Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by refusing on or about October 4, 1974, and at all times thereafter, to recognize and bargain with the Union in an appropriate unit of:

> All production and maintenance employees of Respondent, employed at its Oakdale plant, exclusive of office clericals, guards, and supervisors as defined in Section 2(11) of the Act."

Remedy

Having found that Respondent was obligated to offer reemployment to discriminatees Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo when work first became available during the week ending May 17, 1975, we shall order Respondent to offer immediate reinstatement to these discriminatees and to make them whole by the payment of backpay from that date until the date the discriminatees receive a valid offer of reinstatement from Respondent.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Solboro Knitting Mills, Inc., Oakdale, New

York, its officers, agents successors, and assigns, shall take the action set forth in the said recommended Order, as modified herein:

1. Renumber paragraph 1(f) as 1(g) and insert the following as paragraph 1(f):

"(f) Failing and refusing to recognize and bargain collectively, upon request, with Local 107, International Ladies' Garment Workers Union, AFL-CIO, as the exclusive representative of its employees in the appropriate unit described below. The appropriate bargaining unit is:

> All production and maintenance employees of Respondent, employed at its Oakdale plant, exclusive of office clericals, guards and supervisors as defined in Section 2(11) of the Act."

2. Substitute the following for paragraph 1(a):

"(a) Offer rehire to their old jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole Margaret Passannante, Mary White, Donna Moravec, and Grace Rugolo for any loss of pay suffered by reason of their premature layoff and denial of rehire from the time when work first became available during the week ending May 17, 1975, until the date the discriminatees receive a valid offer of reinstatement from Respondent in the manner set forth in the section entitled the 'Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. January 7, 1977.

Betty Southard Murphy, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member

[SEAL]

NATIONAL LABOR RELATIONS BOARD

MEMBERS PENELLO AND WALTHER, disseting in part:

Contrary to our colleagues of the majority, we would find, in agreement with the Administrative Law Judge, that the discrimination in the refusal to rehire Passannate, White, Moravec, and Rugolo occurred when the request for rehire by each was rejected rather than when, as our colleagues find, Respondent began hiring for the new busy season.

Respondent makes sweaters. The volume of its business and size of its employee complement is related to the season of the year and layoffs take place every fall and sometimes in the spring. Employees are hired only for the duration of the particular busy period, at the end of which they are laid off. They enjoy no right of recall nor is it Respondent's usual practice to initiate the recall of laid-off employees. Rather, its customary practice is not to rehire without some notification from the laid-off employee of his availability and interest in returning. Thus, no laid-off employee has any expectancy of further employment unless he at least communicates to Respondent his availability and desire for employment. By the same token, Respondent is under no obligation to initiate the recall of any laid-off employee. For all practical purposes, where reemployment is concerned, the laid-off employee is a terminated employee. If he wants further employment when work is again available, he must seek it.

In such circumstances we would not find that Respondent unlawfully refused to rehire Passannante, White, Moravec, and Rugolo *before* they requested rehire. When work became available in May 1975, following their discharges in early October 1974. the dischargees stood in precisely the same position as the employees who were

legitimately laid-off on about October 31 when work ran out. As of that date, all the employees, including the claimants, would have been laid-off for lawful business reasons. In that status, any future employment with Respondent was determined by the action taken by them pursuant to Respondent's rehire policy described above. Until any of them communicated an availability and desire for employment, they would not normally even be considered for reemployment; and, in the case of the discriminatees, it follows that an unlawful refusal to hire could not be found. Until then, Respondent would not be put to the test of whether it would rehire them, and even the discriminatees' desire to return would not be known.[7]

By making such finding, we are not, of course, closing our eyes to the fact that Passannante, White, Moravec, and Rugolo were unlawfully laid-off. But *Carbide Tools, Inc.*,[8] relied upon in the majority, does not require that we attach such controlling significance herein to this fact as does the majority. While the Board ordered the reinstatement of the dischargees there with backpay from the date of their discharge, that was because those employees would have continued to work indefinitely but for their unlawful layoff.[9] However, notwithstanding the majority's view to

7. Because of Respondent's unlawful conduct, the majority would excuse even a total failure by the discriminatees to request rehire. But the discriminatees themselves did not assert Respondent's conduct as a reason for the timing of their application for hire. Indeed, the fact that they actually applied for work belies the futility explanation proffered on their behalf by the majority.

8. *Supra.*

9. Note, for example, this finding in the case as to those employees: "The record is clear . . . that the laid-off employees were not told when hired that their jobs were temporary, that they were not warned of layoff on completion of the job on which they were working. . . ."

the contrary, this is not the situation before us. Although Passannante, White, Moravec, and Rugolo were unlawfully laid-off, this merely accelerated a termination which would have occurred in any event on about October 31 for lack of work. Hence our view noted above that, when work became available in 1975, all the employees laid-off on about October 31 or who would have been laid-off then for lack of work had not their layoff been unlawfully accelerated stood in the same shoes, subject to the requirements of the same recall policy. The claimants did not then have a superior right to the work over the others.

This conclusion is compelled by the circumstances of the case, especially the hiring and recall policy of Respondent. Contrary to the majority's accusations, it is not the creation of a general exception in so-called "seasonal industries" cases to the practice normally followed by the Board in remedying unlawful discharges or refusals to hire nor an aberration in the Board's 40 years of administering the Act.[10]

10. We need only note the recent case of *Temperature Systems Corporation*, 195 N.L.R.B. 1023 (1972), wherein an employee hired for the duration of a particular job was discriminatorily discharged before completion of the job. The Board held: "We believe the policies of the Act would be best effectuated by not requiring reinstatement, since Dukart's employment would have been terminated upon completion of the Magic Pan job. We accordingly limit backpay to the date Respondent completed work at the Magic Pan restaurant."

We do not regard *Temperature Systems Corporation* as a distinguishable case and our colleagues' refusal to recognize this fact underlies the error of their position. As already explained, Respondent's employees are hired for the duration of a particular busy season at the end of which they are, for all practical purposes, terminated; when further work becomes available, they are not entitled to it by virtue of prior employment but must seek it, if desired, as any other

Accordingly, we dissent from the majority's finding that the discriminatees should be made whole from the date work became available on May 17, 1975.

Dated, Washington, D.C. January 7, 1977.

John A. Pennello, Member
Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT coercively question any of our employees about their union activities, views or sympathies.

WE WILL NOT threaten any of our employees with loss of jobs or closing the plant or withholding work to avoid unionization.

WE WILL NOT promise benefits to any of our employees to undermine their support for any union.

applicant. So in *Temperature Systems Corporation*. The discriminatee there was hired for a particular job upon the conclusion of which he would have been terminated. In both cases the employees were discharged before the completion of the season or job for which they were hired. But none of the employees suffered a loss of pay beyond the date his employment would have ended for business reasons by virtue of his *discharge*.

WE WILL NOT solicit any of our employees to withdraw from any union.

WE WILL NOT lay off, deny rehire to, or otherwise discriminate against any of our employees because of union activity.

WE WILL NOT fail and refuse to bargain collectively, upon request, with Local 107, International Ladies' Garment Workers Union, AFL—CIO, as the exclusive representative of our employees in the appropriate unit described below. The bargaining unit is:

> All production and maintenance employees of Respondent, employed at its Oakdale plant, exclusive of office clericals, guards, and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT interfere in any other way with our employees' exercise of their rights under the National Labor Relations Act.

WE WILL offer rehire to their jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole Margaret Passannante, Mary White, Donna Moravec, and Grace Rugolo for any loss of pay they may have suffered by reason of our discrimination against them, from the time when work first became available during the week ending May 17, 1975, until the date the discriminatees receive a valid offer of reinstatement from the Respondent.

WE WILL bargain collectively and in good faith with Local 107, International Ladies' Garment Workers Union, AFL—CIO, as the exclusive representative of our employ-

ees, in respect to rates of pay, wages, and other terms and conditions of employment.

SOLBORO KNITTING MILLS, INC.
(Employer)

By .....
(Representative) (Title)

Dated .....

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212-330-7709.

Decision and Proposed Order of the Administrative Law Judge

DECISION

JD-740-75
Brooklyn, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

SOLBORO KNITTING MILLS, INC. *Respondent* and LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO *Charging Party*	Case Nos. 29-CA-4058 29-CA-4571

Harold Weinrich, Esq., counsel
for the General Counsel.
Martin H. Scher, Esq. (*Rains, Pogrebin & Scher, Esqs.*), of
Mineola, N.Y., for the Respondent.
Lester Kushner, Esq., of New York,
N.Y., for the Charging Party.

DECISION

Statement of the Case

IRVING M. HERMAN, Administrative Law Judge: Case No. 4058 was tried before me on February 18, 19, 20, 21 and

Decision and Proposed Order of the Administrative Law Judge

27, 1975,[1] at Brooklyn, New York. Upon a charge filed by Local 107, International Ladies' Garment Workers' Union AFL-CIO (herein called the Union) on October 21, 1974, amended October 24, and duly served upon Respondent, complaint issued January 6, 1975, alleging in substance that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151 *et seq.*), herein called the Act, by interrogation, threats and promises of benefits concerning its employees' union activities, and the circulation of a petition of defection from the Union; that Respondent violated Section 8(a)(3) of the Act by the layoffs of certain employees for their union activities; and that the seriousness of such violations necessitated a bargaining order as a remedy therefor. On October 9, 1975, while this case was pending decision, and in the absence of objection, I granted the General Counsel's motion that it be consolidated with No. 4571, in which complaint issued September 29, 1975, based upon a charge filed by the Union on September 11 and duly served upon Respondent the same day, alleging that Respondent violated Section 8(a)(3) and (4) of the Act by refusing to recall or reemploy the aforesaid laid-off employees because of their union activities and because they had given testimony in No. 4058; and I simultaneously granted the further request in the motion for the reopening of the hearing. Additional testimony was accordingly taken on October 14.

1. All dates herein, unless otherwise stated, are in 1974.

Decision and Proposed Order of the Administrative Law Judge

Upon the entire record,[2] including my observation of the witnesses, and after due consideration of the briefs filed on behalf of all parties,[3] I make the following:

2. The following corrections of the typewritten transcript of testimony are hereby ordered in the interests of clarity on the basis of my notes and common sense:

(1) February hearing:

Page	*Line*	*From*	*To*
40	18	I	she
56	7	Mr.	Mrs.
133	19	6th	3rd
133	19	working	walking
134	12	it Tuesday."	Tuesday."
158	1	with	were
231	16	225	$2.25
410	20	Q	Judge Herman
486	10	independent	innocent
522	2	know. What she was	know what she was
560	17	here	her
756	6	floor lady	forelady
769	1	coor	door
778	23	I',	I'm
784	23	fore-	floor-
785	22	resumed	assumed
1007	9	five	eight
1083	1	floorlady	forelady
1083	2	floorlady	forelady
1083	7	floorlady	forelady
(2) October hearing:			
16	15	Mr.	Mrs.
71	14–15	Merrow Machines, four Seaman Mausers, some frame (phonetic) and Singer single neddle	merrowing machines for seaming, Mausers for trims, and Singer single needle.

3. The General Counsel filed no brief following the October hearing.

Decision and Proposed Order of the Administrative Law Judge

Findings and Conclusions

I.

Respondent's Business

The complaint alleges, the answer admits, and I find that Respondent maintains its principal office and place of business at 15 Pond Road, Oakdale, New York, where it is engaged in contracting for the manufacture of knitted sweaters and related products; that during its fiscal year immediately preceding issuance of the complaint, a representative period, Respondent sold services valued in excess of $50,000 to business enterprises in New York, each of which enterprises annually produces or sells goods valued in excess of $50,000 which it ships directly to other states; and that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II.

The Labor Organization Involved

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III.

The Unfair Labor Practices

A. The Facts

1. Background

Respondent's business is seasonal, involving layoffs every fall and sometimes in the spring. The time of the layoff

varies from year to year. Though signalled by the shutting down of the knitting machines,[4] the interval between such shutdown and the beginning of the layoff extends from about 2 weeks to a longer period[5] depending on the backlog of knit goods. Similarly of uncertain duration is the time lag between the onset of the layoff and the point when it becomes complete.[6] Respondent's orders from the jobbers

4. At the time of the layoff, as in its prior experience, Respondent had four such machines, one of which apparently continued even during the layoff period for the production of samples for the next season.

5. The period could be as long as "a month or two or more," according to O'Connell, the forelady-in-training.

6. In the two fall layoffs immediately prior to the instant one, the payroll records reveal the following:

1972			1973		
Wk. ending	*No. of employees*	*Total Hours*	*Wk. ending*	*No. of employees*	*Total Hours*
11/4	19	787-1/2	8/4	14	520
11/11	19	793	8/11	14	508-1/2
11/18	19	803-1/2	8/18	14	527
11/25	18	531 (No work Friday after Thanksgiving)	8/25	14	527-1/2
			9/1	14	494
			9/8	12	410
12/2	18	672-1/2	9/15	12	397
12/9	16	497-1/2	9/22	12	415-1/2
12/16	14	395-1/4	9/29	12	271-1/2 (No work on 2 days of Jewish New Year)
12/23	14	379			
12/30	—	—			
			10/6	12	436-1/2
			10/13	12	409
			10/20	10	304
			10/27	8	234-1/2
			11/3	10	340-1/2
			11/10	8	190
			11/17	—	—

to whom it supplies its manufacturing services in the fall of 1974 totaled about 2,500 dozen sweaters. Slightly over 1,000 dozen of these were ordered by Sweater Bee, all but 88 dozen of which were styles 1995 and 1996.[7] On Monday, September 30, Respondent received from Sweater Bee a mailgram dispatched the previous Friday evening canceling its orders in respect to the remaining 130-140 dozen of such styles "due to late delivery."

2. Organization of the employees and request for recognition

On July 22, Grace Rugolo, a union member for 13 years, who had previously applied for employment to Respondent's secretary-treasurer, Mrs. Harkavy (also known as Mrs. Murray), and disclosed her membership in the union, received a call from Mrs. Harkavy who offered her a job. Rugolo said she would have to "check it out" with the union to see if she could work in a nonunion shop. She called the Local and was told by Gasper Sciacca,[8] an organizer, to go ahead. He added that if the other employees were interested in a union she would get their names and addresses so that he could discuss the matter with them. She reported for work later that morning and was hired by Mrs. Harkavy.

From her first day at lunch with the other employees, Rugolo testified, she heard daily complaints about the working conditions. She commented that if they were dissatisfied they should do something about it. After some time she mentioned the Union, and the employees agreed to "form a

7. Respondent's other principal customers were Spuncraft Knitting Mills and Penrose Knitwear.

8. Sometimes referred to in the record as Gaby or Gabe or Gave.

group and stick together," so she called Clara Rhatigan, a business agent for the Union, who referred her to Sciacca. Sciacca and Rhatigan visited Rugolo's home on July 31. She signed an authorization card at that time and furnished some employees' names and addresses to Sciacca who later signed up Carmen Gonzales (August 6), Ana Nemec who was recommended by Gonzales (August 9), Josephine O'Connell (October 1), Carmela Cacoperdo (October 3), Donna Moravec (October 3), Joyce Brown (October 3), and Mary White (October 3). Rhatigan signed up Margaret Passannante on October 3.[9]

On October 4, at about 8:30 a.m., Sciacca and Rhatigan visited Respondent's plant. Mrs. Harkavy was present with her husband who is president and vice president of Respondent. They were having breakfast at the time. Sciacca identified himself, claimed to represent a majority of Respondent's employees[10] and offered to prove it. Mr. Harkavy pointed out that his breakfast was being disturbed, stated that he does not see anyone without an appointment, and told Sciacca to either make an appointment or to send him a letter. The union representatives thereupon returned to their office, and Sciacca promptly sent the following mailgram to Respondent:

9. The card-signers numbered 9 of the 13 employees stipulated to constitute the bargaining unit.

10. The record is not clear as to whether the precise term used by Sciacca was "the girls," "the workers" or "the production workers." Mr. Harkavy testified, however, that Respondent employs no other employees aside from production employees."

CONFIRMING OUR VISIT TODAY REPEAT THE MAN FOR RECOGNITION AS COLLECTIVE BARGINING [sic] AGENT FOR SOLBORO KNITTING MILLS INCORPORATED WORKERS WE ARE PREPARED TO PROVE OUR MAJORITY STATUS THIS IS A CONTINEOUS [sic] DEMAND

The Union never received a reply.

3. 8(a)(1)

a. *Post-demand events of October 4*

Ana Nemec testified that about 30-45 minutes after Sciacca left the plant on October 4, Mrs. Harkavy approached her at her workplace and asked to see her in the office. When Nemec reported to the office, Mr. Harkavy was also present. Mrs. Harkavy told Nemec she had heard rumors about the Union and asked if Nemec knew about it and why she had not told her. Nemec replied she had not intended to tell because she favored the Union too. Mrs. Harkavy inquired whether she had had signed a card, and she acknowledged she had. Mrs. Harkavy asked who else was for the Union and had signed a card, and Nemec said she had heard that everyone had but that she had not actually seen them sign, so she really did not know. Mrs. Harkavy told her, "Don't mention this to anyone." Later that day, at lunch, the other girls asked Nemec what had happened in the office, and Nemec told them that Mrs. Harkavy "just wanted to know what's going on." Mrs. Harkavy's version of this incident was that when Nemec

came to the office she said, "I gather you want to see me about the Union," to which Mrs. Harkavy replied, "Yes, what is going on?" and Nemec said, "I have signed up. Mrs. Murray, you are too late. We have all signed up and I will no longer go into any further discussion about that." Mr. Harkavy did not testify on this.

Following the Nemec incident, according to Carmela Cacoperdo's direct examination, Mrs. Harkavy came over to the employees and asked, "You girls want the Union?" No one answered, and Mrs. Harkavy said, "I see you girls don't want your jobs." On cross, Cacoperdo testified as follows in this connection:

> Q. You testified that sometime in the morning after the union had come in to see Mr. and Mrs. Harkavy, that Mrs. Harkavy came out and said something—this was your quote—'I see you girls don't want your jobs.'
>
> A. Right.
>
> Q. Did she say anything about the union?
>
> A. No.

Mrs. Harkavy testified on direct that apart from her conversation with Nemec and a subsequent conversation with Grace Rugolo she had no conversation with any other employee about the Union; but that at least a week before October 4, when Cacoperdo refused to obey an order transmitted through O'Connell, Mrs. Harkavy told Cacoperdo, "Millie, you keep telling me you want the job and here I am telling you what to do and you're refusing it." On cross, however, she testified as follows:

Q. (By Mr. Weinrich) Isn't it true that you threatened to discharge Cacoperdo for failing to carry out an instruction related to her by Josephine O'Connell?

A. I beg your pardon. I did not threaten Carmela Cacoperdo. It had to be a week or so prior, before Mr. Sciacca happened to walk into our place. It had —and I had reprimanded Carmela, equally Julia Delfino, for covering up the work that Mary White or anyone in the plant, new people who are working on garments, which they did not relate to me and I was very disturbed by the fact.

I said, 'You girls don't seem to want your job if you are going to cover up the work, that is, that it should not be covered up,' and, therefore, I felt that it is equally an interest for themselves to hold on and not to cover that Mary White does not do perfect work or someone else in the plant, but it should be brought to my attention, and, thereafter, they brought it to my attention daily to make sure that I have it and see it.

Q. Wasn't it your earlier testimony that your conversation to Mrs. Cacoperdo concerning the statement, 'Do you want your job,' came as a result of an argument between Mrs. Cacoperdo and Josephine O'Connell, where Mrs. Cacoperdo refused to carry out an instruction given her by Josephine O'Connell?

A. My, my testimony earlier is correct that I said that Josephine O'Connell and Cacoperdo had some disagreement, which I am unaware of what the disagreements are, but they came to me, Josephine, and

she said—I asked specifically to drop a particular work and go on, 'Tell Millie Cacoperdo to do that first.' She came back to me and says, Millie refuses to take instructions from me."

I says, 'You tell her that I said so, and if I said so, she will perform that,' which had nothing to do what you are relating to now.

While some of the employees were lunching later that day at the rear of the plant, Mr. Harkavy approached them, calling all the other employees to the rear also so he could address the entire shop. Mrs. Harkavy attended as well. Mary White testified that Mr. Harkavy mentioned the Union's visit and that he stated he had called his lawyer who informed him that Respondent had lost $1,500 that fiscal year (ending September 30), business was very poor and he could not afford increased wages, and in effect that "if we persisted, he would have to close the doors." Asked if he had mentioned the subject of the persistence, White testified she could not "recalled if he mentioned the union" in that context but that "he did say he would close the shop" and that she at least inferred that "if we persisted in wanting the union to represent us, that he would have to close the door." Cacoperdo's testimony was that Harkavy said "he's losing a lot of money and why we girls want the union or he'll have to close down the plant." Joyce Brown's recollection was that Harkavy said he knew some of the girls had joined the Union and he wanted the employees to know that he had been informed by his accountant that Respondent had lost $1,500, "and if this continues there will be no more

Solboro."[11] Asked on cross-examination whether Harkavy had said "that he didn't want [the employees] to be in the union," Carmen Gonzales answered negatively, but she also testified that Harkavy said that he understood the girls wanted to join the Union but things were very slow, his accountant had just told him Respondent had lost $15,000, "and he just couldn't afford it right now, he said. 'Think it over' he said, because things were bad. Otherwise he will have to close." According to Grace Rugolo, Harkavy said the Union had come in to see him that morning, that he had lost $15,000 for the year and had some cancellations "and he couldn't possibly afford a union, and if we did go union he would have to close shop. And his last words were, 'Think it over.' "

Testifying for Respondent, Josephine O'Connell's account of the speech commenced as follows:

A. Well, he called us to the back room and gave a statement in regard that he had lost about $15,000 in past orders and that he understood that the girls were looking to have a union in the shop.

Q. Did he say he could not afford the added expense of a union?

A. He did say financially it would be a burden to him.

Q. Did he leave it up to the girls to decide which way it would be and if they decided for the union then he would have to close the shop?

11. She added that Harkavy concluded by saying, "You girls do what you wish," which she had not attributed to Harkavy in her statement to the Board agent during the investigation.

A. He said it was up to the girls to decide what they want but if things got too bad he would have to close the shop.

Q. Did he say if they decided for the union then he would have to close the shop?

A. Not in those words.

After being confronted with the statement she gave the Board agent during the investigation, O'Connell continued as follows:

Q. And did you make a statement, 'He said business was very slow?'

A. Yes.

Q. When you said 'he,' who are you talking about?

A. Mr. Murray.

Q. Did you say, 'And very bad and the company could not afford added expense of having a union in the shop?'

A. Yes. He said words to that effect.

Q. And that was your recollection?

A. Yes.

Q. Was it also your recollection that he said that 'his accountant said he had lost about $15,000 because of cancelled orders, he left it up to the girls to decide which it would be, and that if they decided for the union he would have to close the shop?'

A. Yes, I made that statement.

Q. Are you now saying Mr. Harkavy did not say that he would have to close the shop if you decide to go for the union?

A. He did say he would have to close the shop but he did it in the same way, if the union came in or didn't come in.

Q. You told that to Mr. Clark?

A. Yes. That is what I understood.

Q. Did you attribute the statement to Mr. Harkavy?

A. Yes.

Judge Herman: And now your testimony is your recollection is you understood that that is what Mr. Harkavy meant?

The Witness: Right.

Q. If I asked you the question you can only tell me what you understand he said?

A. That's right.

Q. Has your understanding changed from the time you gave the statement to Mr. Clark?

A. Well, to the fact that I don't exactly remember him saying that exact words that if the union came in.

Harkavy's own testimony was:

Q. Now, do you recollect with as much precision as you can what you said to the people?

A. I believe I started off saying that I wanted to take a few minutes of their time, and, as I understand, that some people here would like to be represented by the Union, and I said, 'I don't know if you're aware of the economic situation of the company, of the industry in general,' and I brought out the fact that, or the known fact to me, at least, that

expenses would be rising due to Union benefits and that we had been, we had just lost a major order, having cancellation from Sweater Bee, which everyone knew is one of the major items of our line.

I had been informed by my accountant just the previous Wednesday that the company had lost $15,000 for the fiscal year, and that the general market conditions were that the Hong Kong was extremely active, and that the general market conditions were that the Hong Kong was extremely active, the buyers were doing a lot buying in Hong Kong and neglecting the domestic market; that, in general, the customers were very, very hesitant about giving orders and were very tight about their delivery schedules, and that I didn't see how Solboro, if all these economic conditions persisted, I didn't see how Solboro could survive this kind of economic situation, and that was generally the whole basis of the statement.

Were all of the remarks, remarks you made to the people at the rear of the shop?

A. Yes, they were all there.

The Witness: Your Honor, may I add something to the statement I did make concerning my speech?

Judge Herman: Yes.

The Witness: I did say to the girls that this is their decision as to which way they'd like to decide, but I would like to make them aware of what, what the general condition of the company was and what the industry was suffering.

Q. (By Mr. Scher) You made that statement to them, as well?

A. Yes, that was the end of the little talk I gave.

Q. Can you remember precisely what language you used when you said that?

A. I said, 'This is America and you are free to, you know, vote any way you like, but that the general economic condition, situation of the country and Solboro is a situation—I don't know how we can survive added economic expenses.'

b. *O'Connell's letter of withdrawal*

Mrs. Harkavy has been training O'Connell to be a forelady. According to Cacoperdo, "all [the employees] thought she was a forelady" until informed otherwise by Mrs. Harkavy. O'Connell, who is paid on an hourly basis, relays Mrs. Harkavy's instructions and directions to the other employees. Mrs Harkavy denied that this includes any instructions concerning jobs other than what O'Connell "herself knew how to do already," i.e., jobs on which "she was able to instruct them." Nevertheless, since around the beginning of 1973 O'Connell has been learning the operations of the various machines, and it has been her function to give out the work, concerning which she testified as follows:

Q. What function did you serve in the company in, as you called it, giving out work? How would this come about on a daily basis?

A. Well, Mrs. Murrray would each morning, give me a list of what work had to be done, who was to receive it, and I would proceed from there to give out the work to which every person she said to give it to.

Q. And did Mrs. Murray keep a log?

A. Not a written log. I kept all the books as to what work was in boxes to be given out and she in turn would tell me which orders to give out and to who.

Q. And when you would go to the place each day what would you say to them as far as work that they were to do?

A. Well, I just said 'Mrs. Murray said to work on this lot and here's your work.'

Or if it was some other work, then I would say, 'Mrs. Murray said you are to separate,' or 'Mrs. Murray said you are to trim this,' depending [sic] on who I was saying it to.

O'Connell also testified that when Mrs. Harkavy wants an employee to move from one machine to another, she relays such an order too. If the employees have any question about the work, according to O'Connell's further testimony, they call her and ask her to get Mrs. Harkavy to answer their questions. On the few occasions when Mrs. Harkavy is away from the plant, O'Connell testified and Mrs. Harkavy substantially confirmed, a work list is left with her, and if any problem arises she consults Mr. Harkavy who is always present in Mrs. Harkavy's absence. O'Connell admitted, however, that in her statement to the Board agent during the investigation of the case she said, "if the boss is out for a day or for a part of a day then I will have supervision or direction of the shop,"[12] and "I

12. She meant by that her directions were "To give directions outright."

will hand out work to those workers needing work, answering workers' questions if I can and seeing that all workers have work."

On Saturday, October 5, O'Connell sent Sciacca the following letter signed by her, Cacoperdo, Moravec and Nemec:

> We the undersigned have discussed your offer and have decided to withdraw our signatures.
>
> We do not wish to be represented by the International Ladies Garment Workers Union.

O'Connell testified on direct examination that she told her husband that after signing her union authorization card she had learned at work that Sciacca had misrepresented the facts in soliciting her signature by telling her that everyone else had signed up;[13] that her husband advised her to withdraw her card if she felt she had done work, so they composed the letter; and that she telephoned Cacoperdo, Moravec and Nemec, told them what she was doing and asked them to join her if they agreed that they did not

13. O'Connell's husband, who was present when she signed the card at her home, did not testify. Sciacca's testimony of the circumstances under which she signed the card makes no reference to any such representation. He testified, however, without contradiction, that after O'Connell signed she asked him whether he had visited Cacoperdo yet, and when he said no, she told him that Cacoperdo, whom she drove to work every day, lived just around the corner and explained how to get to her house. Cacoperdo testified, in agreement with Sciacca, that she did not sign up that night (October 1) but did sign on the night of October 3 when Sciacca appeared again. She testified further that his second appearance was at her request after O'Connell had told her on October 2 of her signing the previous evening and Cacoperdo's responding, "well, if everybody signed a card, I might as well, too, because I don't want to be the outsider.

want the Union; that they said they would sign the letter and she took it around to each one's house for that purpose.[14] She denied discussing the matter with Mr. or Mrs. Harkavy beforehand, but testified she did give Mrs. Harkavy a copy right after starting work the following Monday, saying "this is a copy of the letter that I sent withdrawing our signature from the union."[15]

On cross, O'Connell admitted that the statement she gave the Board agent during the investigation made no mention of any misrepresentation by Sciacca concerning her being the last person to sign a card and that in that statement she had simply said she had changed her mind about the Union because "the boss said she had changed her mind about the Union because "the boss had been very good to [her]."[16] She testified, however, that she felt Sciacca had misrepresented himself because "I was not told when he came to the house that he was a union delegate. He threw me when he came in. I did not expect him." Her testimony on direct examination in this connection had been as follows:

> Q. Do you recall the circumstances under which you signed the card?
>
> A. Yes.

14. O'Connell testified she "only went to the girls who were the longest employed there" and "did not try to obtain the signatures of the more newly-hired employees."

15. Mrs. Harkavy testified that O'Connell said nothing on that occasion.

16. Nemec testified that this was the reason O'Connell had given her in soliciting her signature on the letter. None of the testimony of any of the co-signers adverts to any comment by O'Connell concerning misrepresentation of any kind by Sciacca.

> Gabe came to my house.
>
> Q. Mr. Sciacca?
>
> A. Yes.
>
> Q. Did you have a conversation with him?
>
> A. Yes.
>
> Q. What did he say to you and what did you say to him?
>
> A. Well, I believe he thought I was expecting him but I was not.
>
> I was expecting someone else and when I opened the coor [sic] I just saw a gentleman and I thought it was the other gentleman but I did ask him into the house.

O'Connell testified further on cross that she had told her co-signers on Sunday that she would give a copy of the letter to Mrs. Harkavy on Monday.

Moravec testified that O'Connell called her on October 6 and cautioned her against telling anybody about the letter. Rugolo testified that Moravec told her about the letter on October 7 so she asked O'Connell why she had not been given the letter to sign, and O'Connell denied any knowledge of the entire matter except to say that she had written a letter just for herself.

c. *O'Connell's alleged promises to Moravec and Cacoperdo*

Moravec testified that O'Connell told her in the telephone conversation of October 6 that there was going to be a layoff but that since she had signed the letter she had nothing to worry about and that when the plant got busy she would

get a raise. O'Connell denied this in substance. Cacoperdo testified that on October 7, while driving O'Connell to work, O'Connell told her that Mrs. Harkavy would take care of her when work improved. On examination by Respondent's counsel, Cacoperdo expanded the statement to "we'll be taken care of, that we'll always have a job and we'll get a raise." While denying that O'Connell had said Mrs. Harkavy had told her to say that, Cacoperdo testified, "I guess Mrs. [Harkavy] must have told her." O'Connell's version of this conversation was:

> We were driving home from work. Millie was upset about the union coming in.
>
> She did not know what would happen and we were discussing things were getting slow.
>
> And she said what will happen to us old timers afterwards.
>
> And I said, usually the old timers come back first to work and like always when the season starts the old timers are always taken care of.
>
> Mr. Murray always takes care of us in the way of a raise.
>
> It's been the policy to get a raise in the beginning of the season even if it is not much.
>
> Q. Did you say that to her?
>
> A. Yes.

Mrs. Harkavy testified that she never told O'Connell to "tell any employee that [she] would take care of them when they returned to work." She also testified that wage raises are usually given at the beginning of each season, quite apart

from merit increases. The payroll records in evidence confirm the giving of general seasonal increases.

d. *The alleged interrogation of Nemec on October 7*

About a half-hour after the start of work on October 7, Mrs. Harkavy approached Nemec at her machine. According to Nemec, Mrs. Harkavy asked if she had signed the letter that O'Connell had written, Nemec answered affirmatively, and Mrs. Harkavy said that perhaps Nemec had made the right decision and walked away. Mrs. Harkavy's testimony was that Nemec called her over to the machine and asked her whether she saw that Nemec had signed the lettter and she responded affirmatively, adding "I hope you made the right decision" or "You made the right decision." Mrs. Harkavy testified further on direct examination that she "was kind of taken by surprise" by Nemec's question. On cross, however, she testified that she "was taken by surprise" and "by shock" by seeing Nemec's signature in view of what Nemec told her the previous Friday.

e. *The alleged threats*

On October 7, according to Moravec, O'Connell told her not to "let them talk [her] out of anything" and "if you change your mind and go back with the union you will be canned with the rest of them." O'Connell denied ever making any statement like the latter to any employee.[17]

17. Moravec testified that before she signed her union card O'Connell asked her if she had signed and, when she said no, told her to "go ahead and sign it." O'Connell's version was that Moravec told her Sciacca had given her a card and she did not know what to do, so O'Connell told her to sign it. In her statement during the investigation O'Connell had said she told Moravec to make up her own mind about signing the card.

Also on October 7, and again later that month, according to Cacoperdo, Mrs. Harkavy told her not to "let anybody try to talk [her] into anything," and on the 7th O'Connell told her that Mrs. Harkavy was not taking any more orders "until everything is straightened out with the union." On cross, she testified as follows in this connection:

> Q. Well, did she tell you that Mrs. Harkavy told me to tell you that she would not take anymore orders or did she just—
>
> A. No.
>
> Q. —make the statement on her own?
>
> A. Mrs. Murray told her.
>
> Q. What exactly did Mrs. O'Connell tell you?
>
> A. About that?
>
> Q. Right.
>
> A. She said Mrs. Murray would not take no more orders until everything is straightened out.
>
> Q. But she didn't say to you that Mrs. Murray told her to tell that to you, did she?
>
> A. No.
>
> Q. And she didn't say that that was her instruction to tell you that, did she?
>
> A. No.

Cacoperdo testified further on direct that once after the Union's visit on October 4 O'Connell told her that if the Union got in Mrs. Harkavy would close the shop. On cross, she agreed that in her statement during the investigation she had phrased this as "[Mrs. Harkavy] would rather close the shop then have the union in.' Her testimony then continued as follows:

Q. Now, with relation to that statement that you just testified that Mrs. O'Connell made to you, namely, that Mrs. O'Connell said to you she would rather close the shop than have the union in, she did not say to you, did she, that Mrs. Harkavy told her that she would rather close the shop than have the union in, did she?

Is that confusing? Do you want me to repeat it?

A. No, no, you don't have to repeat it.

She said that Mrs. Murray had said it, yes. Let me remember because I'm all confused now. I'm so confused. Repeat that again, please.

Q. All right.

To go back to the testimony that you gave just before we had the break—

A. Right.

Q. —you remembered as being an accurate statement that Mrs. O'Connell had said to you in the car on one of those trips—and I quoted from your affidavit, 'She would rather close the shop than have the union in.'

Now, she did not say to you, did she, that Mrs. Harkavy told me that she would rather close—

A. No.

Q. —the shop?

A. No.

Q. All right.

She did not say to you, 'Mrs. Harkavy told me to tell you that she would rather close the shop than have the union in,' did she?

A. No.

O'Connell testified on direct as follows concerning Cacoperdo's testimony:

> Q. Did you ever make a statement to her that the company was not taking any more orders until everything is straightened out with the union?
>
> A. Not that exact statement, no.
>
> Q. Did you say something like it?
>
> A. I said there are no orders coming in, that's why we were getting slow and chances are there would be no orders until the start of the new season.
>
> Q. Did the subject of the union come up at that point?
>
> A. I don't believe so.
>
> Q. Did you say anything concerning—with the phrase 'straightening out with the union' coming up at that time?
>
> A. Well, I said eventually I guess things will be straightened out with the union and it won't matter which way, when the orders come in we'll come back to work.
>
> Q. Did you ever say anything to Carmela, Millie Cacoperdo, to the effect that the company would close up if the union gets in?
>
> A. Well, we were discussing the union another day driving home and she was wondering what the viewpoint was.
>
> My viewpoint was—I said listen, as far as I'm concerned, I think Mrs. Murray would rather close, and that was the extent of the conversation.
>
> And Millie did say something, I hope she doesn't close because I have no other place to go to work.

> Q. Did you tell her that Mrs. Murray said that she would close the shop
>
> A. No, I did not.

On cross, in respect to the statement about closing the shop, she testified:

> Q. You did tell Mrs. Cacoperdo that you thought Mrs. Harkavy would rather close the shop?
>
> A. Yes.
>
> Q. Than let the union in?
>
> A. I don't think I said it that way.[18]

Mrs. Harkavy denied ever telling O'Connell that she would close the plant rather than have a union or to tell that to any employee. However, she did testify as follows:

> Q. Well, over the course of time that Josephine O'Connell has worked for the company, have you had conversations with her in which you have offered your opinion to her on how you feel about a Union in the shop?
>
> A. Not to my knowledge did I offer any opinion whatsoever, none whatsoever that I can recall.
>
> If she formulates her own, I can't help it. The only opinion that I recall expressing this, but at one time—and this goes back, I would say, about two or three years ago—this has been that my feeling is that it's too small a place to be organized, and this had

18. O'Connell testified that at the time she signed her union card she told Sciacca that she thought Mrs. Harkavy "probably would close down the shop because it was too small for a union." General Counsel makes no contention as to this statement to Sciacca.

come to me that the older people who were in our plant felt that way about it, that we are, too.

And O'Connell added that Mrs. Harkavy had said that "she would like to keep it on a family basis." She continued:

Q. But you have come to understand that Mrs. Harkavy believed the shop is not big enough to hold a union?

A. Well, she felt unions are good in other shops but she didn't feel in our shop.

Q. Did you ever make the statement, 'I have come to understand the bosses believe the shop is not big enough to hold a union'?

A. Yes, I did.

Q. Can you recall any specific time Mrs. Harkavy told you that?

A. There was no specific time.

Q. Were any other employees present when Mrs. Harkavy said that?

A. I believe there was sometimes.

Q. You were asked if Mrs. Harkavy told you that she would close down the shop if the union came in.

A. She never said in those words. She never made the statement.

Q. What words did she say?

A. It was just my viewpoint that I got from talking with her.

f. *The events of October 8*

At about 7:30 on the morning of October 8, Sciacca and Rhatigan, joined by Rugolo, Moravec, Brown, White and

Passannante, stationed themselves at the driveways to the plant to distribute leaflets and buttons to the employees entering. When the Harkavys arrived, according to Sciacca, he said "Good morning," Harkavy, said, "Well, don't you know you're on my property. Get the hell out," and Sciacca denied it was Respondent's property and dared him to call the police. The Harkavys then drove in. A few minutes before 8 o'clock the employees engaged in this activity reported in for work, except for Passannante and White, who had already been laid off, and who returned home. Rhatigan's testimony has Harkavy saying, "Get off my property." After the girls had come in, wearing their buttons Mrs. Harkavy asked Rugolo if that was legal and Rugolo said it was. Mrs. Harkavy continued to complain about such things in her "house" or "home" or "place", but her husband told her to leave Rugolo alone, and they walked away. Moravec had her button on her blouse under her coat. She testified that after she entered, Mrs. Harkavy said "You are inside now. You can take off your coat," and that Mrs. Harkavy had never told her to do that before. Mrs. Harkavy denied the incident occurred.

g. *Subsequent alleged misconduct*

Rugolo was laid off October 8. On October 10, she returned to the plant to get her paycheck and proceeded to join the other employees who were lunching at the rear. Mr. Harkavy objected to her presence and an argument ensued. Later, Gonzales was called into the office and was asked to sign a paper recording that occurrence and she demurred. Then, according to Gonzales, Mrs. Harkavy "started talking about what was being with the union and

the girls. And then she asked me if I was a union member." Gonzales said, "No. I signed the card just like the other girls. I'm not a union member now." Mrs. Harkavy asked her what Rugolo "was trying to accomplish. I told her I didn't know what she was trying to do."[19]

Gonzales admitted on cross that in their office conversation Mrs. Harkavy said:

> We do not hold it against you girls that you went with the union. We cannot afford the wages. We cannot compete with Hong Kong.

Mrs. Harkavy did not specifically deny Gonzales' testimony. However, Mr. Harkavy, on rebuttal denied that *he* asked her any question about the Union.

General Counsel presented no evidence in his *prima facie* case to support his allegation that Mrs. Harkavy unlawfully interrogated Andrew Zimmerman. However, in cross-examining Mrs. Harkavy he elicited the following:

> The Witness: I—Zimmerman came to me, I would say sometime after the 4th, which would be another three, four or five days after—I'm not certain exactly on the dates—approximately Monday, Tuesday or Wednesday, one of those days, and he said to me, 'What's happening here with the Union?
>
> And I said, 'Don't worry about it.' With that he said, 'Someone had contacted me,' and he tells—he did not release the name at first—he would like to see me, and that was the end of the conversation.

19. Gonzales eventually signed the paper, as had Eve, O'Connell, Nemec, Delfino, Cacoperdo and Kilz, the knitter. The General Counsel raises no issue as to the signing but does allege as unlawful the interrogation of Gonzales by Mrs. Harkavy, as recited above.

> The very next day he walked into my plant and he said a name. 'Mr. Gaspar Sciacca came to see me. I spent two hours with him in my house.' With that, I said, 'Andrew, you told me yesterday you were not interested in anything. How come you spend so much time with Mr. Sciacca?'
>
> And he answered me that he will speak from Hitler to Stalin, to anyone who will speak to him. Now, this is not the complete answer, full story.[20]

4. The layoffs

a. *Passannante*

Margaret Passannante started working for Respondent on September 16 as a Singer machine operator.[21] She did not want fulltime work because of Social Security limitations, and chose Respondent's place because she knew the work to be seasonal. At the time of her hire, according to her testimony, she asked if her workday could end at 3:30 instead of 4:30. Mrs. Harkavy said she could do that only when the plant was slow. During her brief employment she worked till 4:30 except on the Monday of her last week. On Thursday of that week, at the end of the day, October 3, she told Mrs. Harkavy that she would be unable to report the following day because she had to be in court in connec-

20. The complaint contains no allegation, and General Counsel's brief makes no contention, concerning the testimony of Cacoperdo that Mrs. Harkavy asked her in November, when she went to the plant to pick up her paycheck, whether anyone was "pressing" her "about the union."

21. This operation appeared to come about midway in the production process.

tion with a case she had informed Mrs. Harkavy about when she was hired. Mrs. Harkavy said that that was all right and that she would see her Monday. Passannante then said that she became too tired working till 4:30 and would like to end her day at 3:30. Mrs. Harkavy said they would discuss it on Monday. When Passannante left on October 3, she testified on direct, she had about 3-4 hours of work remaining in her basket, and more work was being prepared but she did not know how much. On cross, she conceded she was unable to make a sound estimate of the time it would have taken her to complete the work in her basket. On Friday afternoon, Mrs. Harkavy phoned Passannante to say there would be no work for her on Monday, and that Passannante should call her Monday night to find out about Tuesday. When she called Monday, Mrs. Harkavy told her there would be no work on Tuesday but to call Tuesday concerning Wednesday. On Tuesday morning she joined the group distributing the buttons and leaflets. She called the plant that afternoon and was told to try again the next day, which she did, equally fruitlessly. She then went to the plant to get her paycheck, and Mr. Harkavy told her he did not know when there would be work, saying "We'll see when we straighten all this out."[22] He told her she could apply for unemployment compensation and to "keep in touch." Passannante testified that she once expressed her prounion attitude during a luncheon discussion among the employees in the plant.

22. Mr. Harkavy testified that Passannante said she "hope[d] things get straightened out" and that he merely joined in that hope. He "assumed . . . that she was referring to the union problem."

Both Rugolo and Gonzales testified that Mrs. Harkavy operated Passannante's machine after she left. Mrs. Harkavy's testimony, corroborated by her husband, was that Passannante, whose competence she appreciated, had completed her work by the time she left; that she was there only on a part-time basis to do such work as might be available; that she was not laid off but her work simply ran out, and she was to keep in touch to ascertain when more work would be available.

b. *White*

Mary White commenced working for Respondent on August 27. She was a sewing machine operator and handled three different machines around midway in the production process.[23] She acknowledged that she indicated some prior experience on the merrow machine[24] and asked to be allowed to try that work, but that she found that machine faster than the one she had been accustomed to and beyond her capacity. In her hiring interview, when it appeared that she had previously worked for a union shop, Mrs. Harkavy told her that Respondent's was "more like a family shop" "rather than a union shop" where the employee was "not a person [but] just a clock number." White said it did not matter, that all she wanted was a "steady, full-time position, which [Mrs. Harkavy] told her it was and they had very few layoffs." White did not join the Union immediately

23. The Mauser (which put the binding on), her primary job; labeling; and tacking or tatting (adding fur collars and cuffs).

24. Which does the seaming and, in Mrs. Harkavy's words, "is the most complicated [and "the most intricate"] machine in our plant."

when contacted by Sciacca but first checked with the other employees to see what they were doing. Neither the Harkavys nor O'Connell was present durings such discussion.

Just before or after lunch on Monday, October 7, Mrs. Harkavy shifted White from the Mauser machine to the labeling machine. At that time, she testified, she still had at least another day's work on the Mauser, but Mrs. Harkavy worked all afternoon on it.[25] White completed the labeling work about 4 o'clock and asked Mrs. Harkavy what to do next. Mrs. Harkavy told here there was nothing more to do and that she should punch out and go home. Mrs. Harkavy added that all the work White had done that morning was bad and had to be redone. According to White, Mrs. Harkavy passed her bench and looked at her work quickly almost daily prior to October 7 and usually said it was "Beautiful" or "very good." She further testified that on the morning of October 7 Mrs. Harkavy had examined her work on the Mauser machine and said it was "very good." But asked whether on that occasion Mrs. Harkavy had said "anything about your pulling the work too tight," White testified, "I don't recall, but I really and truly don't think she did." And she conceded that she was still learning that machine, that there were occasions when Mrs. Harkavy made such criticisms, and that she may have done so that morning at the same time that she praised her generally. White also testified that when Mrs. Harkavy replaced her she did not redo White's work but did new work. When she left on October 7, Mrs. Harkavy told her there was no more work for her at that time and to call next week to

25. Mrs. Harkavy had never replaced her on the Mauser before.

learn if there was some, but she estimated (while conceding "It is hard for me to judge") that there was "maybe about a day's work possibly" on the same style garment she had been working on. She also testified that she was not aware of any slowdown in the plant at that time although she could not recall if the knitting machines were still running; and as to whether new garments were being cut, she testified, "when you're working you don't observe all these things." She had been given no warning by the Harkavys of an impending layoff. White called Mrs. Harkavy about October 15 and about two or three times more but was told there was no work, they would have to await the return of the buyers from Hong Kong, and finally that if work became available Mrs. Harkavy would call her.

Nemec, who, according to Mrs. Harkavy, succeeded to the functions formerly performed by White[26] testified that she helped White sometimes when she had trouble on the labeling machine; that White could operate the machine only about half as fast as Nemec; and there was some work of White's that Nemec was supposed to fix but which she never got around to before her own layoff. Delfino testified that she received, for marking, the garments on which White had put the bindings and that she frequently found White's work defective and so reported to Mrs. Harkavy who had to do it over; that some such work done by White on her last day was redone by Mrs. Harkavy and some still remained as of the time of Delfino's layoff. O'Connell confirmed that quite a bit of White's work on October 7 was defective and was still awaiting redoing. Mrs. Harkavy's

26. Gonzales testified that Mrs. Harkavy performed such functions.

testimony was that White's work was generally unsatisfactory and she spent much of October 7 fixing work White had "ruined" the day before. She conceded on cross, however, that White was not laid off for incompetence.

c. *Moravec*

Donna Moravec's employment with Respondent started May 2. Her principal job was separating, which involved working on the material as it came from the knitting machines, but she also occasionally buttoned and trimmed finished garments.[27] When first solicited by Sciacca she said she wanted to discuss the matter with the other girls, which she did before signing a card. Moravec testified that shortly before noon on October 8, she completed work on certain bone garments which had to be done that day, following which she started on some samples in accordance with instructions Mrs. Harkavy had given her earlier that morning. However, Mrs. Harkavy told her to stop work on the samples.[28] At least a day's work on other bundles which had been brought to her earlier that day were taken away after a few minutes, O'Connell saying they had changed their minds and were not going to do that work. Moravec then went to Joyce Brown, as she usually did, to get a bundle on which Brown was putting buttons and button holes so that she could do the follow-up work of buttoning and trimming the garments. Mrs. Harkavy asked her "What's your trouble?" She replied that she had run out of work and was waiting for Brown's bundle. Mrs. Harkavy then said there was no more work and that she "might as well go home." Moravec called three or four times thereafter but was told there was no work and to keep in touch. On her second call, according to Moravec, Mrs. Harkavy asked her why she had changed her mind; she answered that the girls had been getting her so confused that she did not know what to do; Mrs. Harkavy then said something to the effect that if she did not sign anything she would not get anything, but Moravec did not know what she meant, and Mrs. Harkavy also said, "nobody is going to help you. You are alone," and "The girls have no right to push you around; you are an innocent bystander." In a subsequent conversation, Mrs. Harkavy said she might have work and to call back later that day, which she did, but Mrs. Harkavy, after checking, said "I don't think I really have enough work to bother with for you to come back for one day." Moravec also testified that when she went to the plant to get her paycheck she saw that the goods O'Connell had said they were not going to work on had been worked on. She recognized the goods by their colors—blue, green and lavender.

27. This latter work was part of the floor duties principally performed by Delfino who also was the only employee who marked the sweaters for the insertion of button holes. Delfino was about 10 days junior to Moravec but was not laid off until 2 weeks after Moravec.

28. Moravec admitted on cross that finishing up the samples would have taken only 5-10 minutes.

Mrs. Harkavy testified that Moravec, although one of the more senior employees, would be one of the first to be laid off because apart from menial work she performed only one operation, i.e., separating, which was the first operation of

the knit goods.[29] She testified further that she should have laid Moravec off the night of October 7, which would have been the normal practice, because there was only about an hour's work that remained for the 8th; and that since she had permitted Moravec to come in on the 8th she made work for her by telling her, when she asked what to do at about 9 o'clock, to walk over and help some of the other girls until noon. According to Mrs. Harkavy, whatever separating work remained at the time of Moravec's layoff was minor and could be performed by more senior employees, particularly Cacoperdo. She also testified that the colors Moravec said she saw when she picked up her last paycheck could not have been in the shop while Moravec was still working because the samples in those colors were not made up until after her layoff.

d. *Rugolo*

Grace Rugolo began working for Respondent July 22 as a merrow machine operator. Her function was the first machine operation, coming right after the cutting. She had 13 years' experience, but on other types of machines. Mrs. Harkavy praised her work, however, according to Rugolo, giving her a 25-cent per hour raise only a week after her hire.[30] On October 8, the day of the incident over her wearing the union button, she had a bin full of work in the morning, which she completed, but in the afternoon she was given only three or four dozen sweaters at a time. She testified, however, that unlike the day before when the work kept coming out, "everything sort of slowed down" on the 8th. She also testified that sometime that afternoon Mrs. Harkavy sat down at the machine next to hers to do some work and remarked, "I should have listened to Kay because Kay always hated you."[31] Rugolo responded that if anybody hated anyone her workers hated her because she was a terrible boss. Mrs. Harkavy agreed. After a while, when she continued to get only a few dozen garments at a time, Rugolo commented, "I guess I'm going to be the next one to get laid off," and Mrs. Harkavy answered, "Now why do you say that? I have plenty of work for you." But about an hour later, after finishing a few more dozen, Mrs. Harkavy said there was no more work for her and "You can go home now and keep in touch." So she punched out at 3:30. According to Rugolo, more than one knitting machine was operating that day and there were goods on the cutting table that would have given her about another 2 hours' work. When she went back to get her paycheck she saw Mrs. Harkavy cutting goods of the type she had been working on.

Mrs. Harkavy testified that she had two merrow operators at the time of Rugolo's layoff, the other being Gonzales who had seniority and who was much more competent at

29. For this reason she insisted that Moravec "ha[d] to be" the first one laid off, but she ultimately acknowledged that she erred if the books showed White to have been laid off before Moravec, as they did. She nevertheless testified, after examining the records, that they were both laid off "the same day." As indicated, *supra,* she did not regard Passannante as a layoff but simply as one who had completed the particular work for which she had been hired.

30. This brought her rate to $2.50 which matched Gonzales' and exceeded that of all the other employees except Kilz, the knitter, and Zimmerman, the presser.

31. Kay had worked for Mrs. Harkavy for 27 years, according to Rugolo, and quit because she made only 10 cents an hour more than Rugolo and was unable to get a raise.

the work and also performed many other operations;[32] that Rugolo was not able to do the merrowing work for the Spuncraft sweaters that remained at the time of her layoff and it would have taken too long to train her for that;[33] and that Rugolo's 25-cent raise was not a merit increase but rather intended to give her confidence. Respondent's cutting book and orders show, however, that Rugolo had worked on Sweater Bee's most expense garments whose labor costs exceeded those of the Spuncraft sweaters and which Mr. Harkavy called "much more expensive" and involving "more detail, there is more attention paid . . . [and] more critical work."

e. *General*

At the time of the layoff, the unit employees (i.e., all the employees in the plant) in order of seniority (so far as known) and their dates of hire and dates of layoff or other separation were as follows:

Name	*Hired*	*Laid off or separated*
Richard Kilz	Pre-'72	[34]
Nemec	9/69	11/28
Cacoperdo	9/71	11/1
O'Connell	10/71	11/28
Moravec	5/2/74	10/8
Eve	5/2/74	11/5
Delfino	5/14/74	10/21
Gonzales	6/20/74	11/8
Rugolo	7/22/74	10/8
Zimmerman	8/9/74	10/25
Brown	9/3/74	10/25 (resigned)
White	8/27/74	10/7
Passannante	9/16/74	10/4 or 10/7

32. Although Mrs. Harkavy testified that Gonzales was the only one other than Rugolo "doing the merrowing on October the 8th and 9th, 1974," the payroll records show Gonzales was absent on those days, and Mrs. Harkavy so conceded.

33. This testimony came on cross-examination in response to the General Counsel's questioning the suddenness of Rugolo's layoff on October 8 in view of Gonzales' absence on that day and the next day.

34. Knitter traditionally remains on payroll during general layoff.

The order of production was generally as follows: Knitting (Richard Kilz), separating (Moravec), steaming and pressing (Zimmerman), cutting (O'Connell and Mrs. Harkavy), merrowing (Rugolo and Gonzales), Mausering (White), labeling and tacking (Nemec, White and Passannante), pockets (Passannante), marking (Delfino), buttons and button holes (Brown), cleaning and finishing (Cacoperdo, Moravec and Delfino), cuffs and collars (Brown, Nemec, O'Connell and Cacoperdo), pressing (Zimmerman), packing and shipping (Eve).

Gonzales' testimony indicated that a shortage of work did not develop until the last week in October. Nemec testified on direct that the work did not slow up until around the end of October but changed this on cross to the end of September. However, she testified further on cross that the knitting machines did not stop until "toward the end of October," then "maybe the middle of October," then "they were just getting slow at [the] time [of the Union's visit on October 4]." then "they were just about finished" at that time. She also conceded having said in her statement during the investigation that her work was backing up during the last 2 weeks of October, and she was asked to work full days instead of the 6 hours she normally worked. Brown could recall no slowdown in production before the first layoff. Although she further testified that the knitting machines were running up to October 4 and thereafter "as far as [she] could see" she confessed that she was unable to tell whether it was more than one machine. Respondent's witness Delfino testified that she wanted to visit a sick brother some time in September but "we were busy" and "I didn't have time," so she chose to

wait until the work slowed down; about the second week in October she decided to ask for time off but waited till the work slowed down "a little more," and she took off October 18.

O'Connell testified that except for the one knitting machine used for samples, the others were shut down by "the end of September," which she later qualified to "around the middle of September." She admitted on cross, however, that "there was enough work for everybody to keep busy in the shop" until receipt of the Sweater Bee cancellation on September 30; and, as indicated above (n.5), that "sometimes" the knitting machines are shut down "for a month or two or more prior to a layoff." On redirect, she testified that she had not meant to say that until the cancellation there "was an excess amount [of work] but there was enough to keep everyone working to a great extent. They may not have worked a full day but enough to keep them working." Despite the cancellation, they continued the Sweater Bee work and completed it in November.

Mr. Harkavy testified that November 15 is usually the cutoff date for shipment of Christmas merchandise. In September and October of 1974 his customers were "running scared" because of cancellations by retailers. He had not received reorders which normally came in between August and October. By the second or third week in September, he testified, only one of the knitting machines was in operation, finishing off the Spuncraft order and for samples, and in October "the knitting machines almost ran exclusively for the production of sample garments." But "October was critical," according to his testimony. Following the Sweater Bee cancellation, which was the first he

had ever experienced, he "was extremely worried about [other] cancellations," and therefore determined to meet Spuncraft's demand for final delivery by October 30, which he did. On cross, he testified as follows concerning the cancelled sweaters:

> Q. Is it correct that with the people that were present in your shop working on this sweater that they could not achieve delivery in the specified time although working a full week?
>
> A. Well, it's apparent. We were unable to effect delivery because we were not able to produce the merchandise on time.
>
> Q. So, would it also be correct that up until the cancellation of that order there was enough work for everybody in that shop to work full time?
>
> Mr. Scher: Objection, Your Honor.
>
> Judge Herman: Overruled.
>
> A. Up till the cancellation date, there was enough work for how long?
>
> Q. (By Mr. Weinrich) Up until that date?
>
> A. Yes, there was enough work to work full time.
>
> Q. How long would it have taken to complete the 135 dozen goods that were cancelled?
>
> A. Well, in conjunction with the other goods that we had in production, I would say it would take us until sometime in November.

He further testified, in answer to the question whether on October 4 "[t]here was [any] longer any rush to get the Sweater Bee orders out," that "We were trying to salvage our business, so it was up in the air as to whether we should

follow through production or not . . . . We were trying to regain the—their commitment to accept the goods." On redirect, however, he testified that "once the sweater cancellation was received," "There was no pressure whatsoever" concerning production of those sweaters, which permitted Respondent to cut the staff to those who could perform multi-operations, which it in fact did, resulting in the completion of the work "by the end of November," when Nemec and O'Connell were the last to be laid off.

According to Mrs. Harkavy, the cancellation "was a major factor" in the layoff, and this gradual cutback meant giving the older employees "a full day's work."[35] Her primary criterion in determining the order of layoff is seniority, but because of the inexperience of the employees, competence and versatility also counted here as well as their position in the production line.[36]

35. Between the last week in August and the completion of the layoff at the end of November the employment picture was as follows:

Wk. ending	*No. of employees*	*Total hrs.*
8/31	14	497-1/4
9/7	12	456
9/14	13	507
9/21	14	449-3/4 (shop closed 1 day for Jewish New Year)
9/28	14	456 (shop closed on Day of Atonement)
10/5	14	519-1/2
10/12	12	365
10/19	9	300-1/2
10/26	9	294-1/2
11/2	6	226
11/9	5	164
11/16	3	110
11/23	3	108
11/30	3	96

36. Nemec and O'Connell stressed seniority as usually controlling, although O'Connell also noted the other factors mentioned by Mrs. Harkavy.

5. The new knitting machinery

Between December 1974 and February 1975 Respondent installed a new type of knitting machinery which Mrs. Harkavy testified changed its operation "to a completely different structure of knitting," requiring more floor help and unskilled labor than formerly. She also testified on direct examination that since the resumption of production in May 1975 Respondent had not used the Singer single needle machines or the Mausers;[37] and Respondent introduced into evidence a three-page article that had been published in the July 21, 1975, issue of Knitting Times, a trade magazine[38] describing the new machinery and its function in the production process in Respondent's plant, as "corroborative of the testimony I am introducing here today, to the effect that the company's operation has changed, to the extent that there was no more Singer work, there was no more Mauser work, different kinds of work are called for, utilizing different styles." The magazine article, however, states, *inter alia,*

> In general, the sewing operation runs from sewing the sleeve and shoulder to sewing in the neck and closing the neck to completion of the garment. Merrowing machines are used for seaming, Mausers for trims, Singer or single-needle units for putting in pockets and the like, and buttonholers, button sewers and labelers for finishing the garments.

37. Although she went along on cross with the statement that Respondent had "used neither the Mauser or the merrow machine," I find this reference to the merrow to have been inadvertent in light of all the testimony.

38. The official publication of the National Knitted Outerwear Association.

When asked about this apparent discrepancy on cross, Mrs. Harkavy testified in substance that she has various machines, including some not mentioned in the article, and indeed some that "do not even relate to the knitwear industry," for various special functions and styling, "if there is need for them," and that "[t]he Singer machine is rarely used in our plant. There are occasions, depending on style";[39] but that in general the only sewing operation still performed is the merrowing and the only other machine still used is the labeling machine which is the "simplest" and is operated by floor help. And to General Counsel's suggestion that the new knitting machine only knits the fabric which "still has to be cut" and hence "has nothing to do with sewing together the pieces," she responded that it has an effect because the present concentration is more on the quality of the fabric than on the style of the garment.

6. The refusal to reemploy the alleged 8(a)(3)'s

Mrs. Harkavy admitted that Respondent began to "recall" laid-off employees in the week ending May 17, 1975, but later testified that while she "occasionally, but very seldom" initiates the process, the initiative usually lies with the employees themselves pursuant to her instruction at the time of the layoff to "keep in touch." In any event, Nemec

39. Asked whether since the resumption of operations there have been employees "operating the type of machines formerly operated by Grace Rugolo, Margaret Passannante and Mary White," Mrs. Harkavy replied, "Not White."

and O'Connell returned on May 12,[40] presser Philip Kilz on May 28, Cacoperdo on June 3,[41] Eve on June 11,[42] and Delfino on June 16 for floor help.

Respondent also placed newspaper advertisements in June, July, August and September, six of which are in evidence, the ones on June 6, 10, 12, 13 and 14 calling for "OPERATORS, MERROW, SINGER, FLOOR HELP, STEAMER"; and the one for September 26 reading "OPERATORS, FLOOR HELP, STEAMER. WILL TRAIN IF QUALIFIED." Mrs. Harkavy's explanation for advertising for Singer operators, in the face of her testimony that there was no Singer work, was that Respondent "overadvertised" because:

> For a Singer Machine, practically everyone knows what it indicates.
>
> If I just seek floor help by itself, we find that people will answer, floor waxers, and if I indicate just steamers by itself, they will be steamers but unrelated to us.
>
> So this will give us an indication, listing one or two machines, of people recognizing what kind of operation.
>
> It indicates, pertaining to the sewing type of operation, that is number one.

40. Nemec as "operator, all phases of operation, every single machine in the plant she can operate"; O'Connell as "floor help plus learning to sew, sewing machines. Trained to learn certain operation on sewing machines, which is right now one single machine that she is learning."

41. "Floor help, trimmer, separator and all other phases on the floor, whatever is essential to floor help."

42. "Packer plus floor help."

Number two, many times we have a larger source and bigger flow of people and interview them on the phone, and it gives me a good indication whether this person is capable of doing multiple operation or just specific any one area.

Many times people are experienced in Singer, it could be Merrow, any type of machine in the industry, but is capable of handling more than one operation.

So that is why it is a guide for the public, to understand the ad.

It is just clarification, what type of operation.

Q. (By Mr. Scher) Can you explain what you mean when you say that people will call you in response to the ad and then you will find out other skills that they have?

What do you mean by that?

A. Well, I don't like to drag people into the plant just for the sake that they are responding to an ad.

I interview them on the phone first, I do interview and seek out what type of skills they have, and if they have more than one or the particular skill that I need at the time, when I will ask them to appear in person and in person give them an application.

Many times that same person who appears, I will find out if—find out I am able to train and is capable of handling multiple operations, not just one.

It has happened many times.

Q. So that, in other words, sometimes will it happen that person will answer your ad for a particular machine—

A. Correct.

Q. —and in your conversation you will find out if they can operate other machines also?

A. Or are willing to operate other machines.

Sometimes people are specifying one single machine, that is the only one they will operate, and if I don't have the need for that machine I will not request them to come.

I may request them to come and fill out an application, but that does not mean that I hire them.

But a person who is willing and able and desires, I will then take them on those basis.

Q. When you advertised for more machines, do you get a larger response to your ad?

A. Yes, I do.

Mrs. Harkavy testified further that she "keep[s] rechanging, rewording" her ads "to attract certain people that I desire and I need." But she also testified that she "just call[s] an advertising agency and put[s] in an ad, I don't even look at the ad . . . . I leave it up to the agency, let them run the ad" because "they are the experts."

New employees have been hired as follows: On June 10, Flores, steamer, June 16, Arias, knitter, Schoellig, steamer, and Roxburg (who worked only 5 days and is not further identified); June 17, Meyer, "operator"; June 20, Wendolowski, separator; July 11, Cerritos, "operator"; July 15, Maenza, floor help; August 6, Maltaghati, "operator";[43] August 11, Behnke, separator; August 18, Gasperi, "opera-

43. Although not employed at the time of the last layoff, she had worked for Respondent for many years prior thereto and had in fact operated the merrow machine later run by Rugolo during the past season.

tor"; August 25, Ortiz, steamer; August 27, Kauffman, steamer and presser;[44] and on October 3, Vampatella, steamer. "[Q]uite a few" of the new hires were found incompetent and accordingly "fired" by Mrs. Harkavy.[45]

Meanwhile, Rugolo, Moravec, White and Passannante wrote to Mrs. Harkavy, requesting recall. None of these requests were granted.

a. *Rugolo*

Rugolo's request, sent June 23, was as follows:

> Dear Mrs. Murry.
>
> I Grace Rugolo am ready & able to report back to work. I trust that I will be hearing from you in the near future.

On July 1, Mrs. Harkavy sent the following reply:

> Dear Grace,
>
> I received your registered letter Saturday, but I think you know what my answer is going to be.
>
> Fortunately, last fall the season came to an abrupt end for Solboro and the result was that you were laid off and it did not reach the point of another incident between us. I say, fortunately, because if business had remained good and there had been no need for layoffs, I would have let you go anyway because of

44. Worked for Respondent for about 4 years, but not at time of last layoff.

45. Mrs. Harkavy testified that she does not like to hurt people and will generally avoid telling an employee he is "finished because [he is] incompetent."

> your foul mouth. I don't think it is reasonable for you to think that I can forget hearing you call me a 'Fucking Son of a Bitch' that day in October when I brought work for you to do instead of Jo O'Connell bringing it to you.
>
> I know from my many years of working with people that an employee can say or do something to the boss, which really puts an end to the relationship and makes it impossible for them to work together afterwards. As far as I am concerned, you did exactly that with your vulgar, abusive outburst.
>
> If after some more time passes and I feel differently about you, and I can put what you said out of my mind, I may reconsider, but right now it is too fresh in my mind.

Rugolo testified that although she had accused Mrs. Harkavy on the day of her layoff of failing to treat her workers properly and being a bad boss, in substantial corroboration of her testimony at the February hearing, she never called Mrs. Harkavy any name or used vulgar language toward her; and that she had never been told she would not be reemployed for such a reason. According to Rugolo, the only witness to her conversation with Mrs. Harkavy was Joyce Brown.

Mrs. Harkavy's testimony on direct examination in October was that she had "understood" early on the morning of Rugolo's layoff that Rugolo had "had a brawl" with some employees whom she had "insulted" and "abused" and "was extremely keyed up all day"; that therefore she (Mrs. Harkavy) decided to bring Rugolo's work to her

rather than follow the usual practice of having O'Connell give her the work; and that when she did so that afternoon Rugolo, who until then had been "a perfect model operator," "insulted" and "abused" her with the language mentioned in her letter in an "outrageous outburst,"

> and I feel when she turned and walked out in an abusive huff, using profane f..... SOB language, plus to me, to me, sir, and walking out that day, the last day, let alone return two days later and insulting my husband in front of the whole plant deliberately, I cannot accept that and I cannot accept that from her.

Mrs. Harkavy added that Nemec, O'Connell and Capoperdo were in the immediate area at the time in addition to Brown.

On cross, Mrs. Harkavy testified that Rugolo was "a satisfactory merrow operator" but was laid off "because of lack of work, at the time, that was one of the reasons." This soon expanded to "lack of work, plus the outrage that she took. I was outraged myself at that point. I was hurt." But she admitted she did not "fire" Rugolo at that point, and that when Rugolo returned to the plant 2 days later Mr. Harkavy told Rugolo "that she was not terminated, that she was only laid off."[46] Adverting to that visit by Rugolo, Mrs. Harkavy testfied:

> There was no need for this kind of animosity, there was no reason to insult me and abuse me, but

46. According to Mrs. Harkavy, she got her husband to question Rugolos presence on that occasion precisely because of the "outrage" allegedly inflicted upon her on October 8.

> she turns around, abuses my husband, the president of this company, abuses him in front of the whole plant at lunch time, in front of all the people there, and this I will not take from anybody, in any place, in any course.
>
> I have been so abused in my life, so much, that I will not accept it.

Mrs. Harkavy also testified that her merrow operators at the time of the October hearing were Maltaghati, Nemec and Cacoperdo.

b. *Passannante*

Passannante wrote Mrs. Harkavy on July 21:

> Dear Mrs. Murray
>
> Your ad for workers has been in the papers for at least 4 wks. I wasn't called and I'm ready and willing to work right now. Please inform

Mrs. Harkavy did not reply. Her explanation for such inaction was:

> A. The mere fact, the way she phrased that letter, I was very upset.
>
> A woman who walked into my plant without any advertisement prior, to seek a job, and a person who is seeking a job makes it her business to look for a position, phone me, which we pretty much are isolated, we are not known, where we are located it would be difficult for us to find—for them to find us without getting some address or some information

or some advertisement, otherwise we do not have transients and people walking into the plant.

She walked in and sought a job, now after nine and a half months Margaret Passannante has not made one single effort at anytime to contact me, to request if there is work available, 'is there anything available for me?'

At no time, with the exception of sending that letter—not only that, but sending me a letter nine months later, reading that she saw the ad for four weeks in a row, and she is telling me, demanding, actually a job.

That is why I did not respond, I was outraged at that kind of an attitude.

It only looked like it was some kind of a set up to me.

It was outrageous, I absolutely refused to go into it beyond that point.[47]

She testified, nevertheless, that Passannante was "an excellent operator" with whose work she was "extremely satisfied," and that if Respondent had Singer or Mauser work, or "additional work above and beyond the work that Jo O'Connell and Ana Nemec are doing now," she would take her back.[48] On cross, however, she testified as follows in respect to Passannante, Moravec and White:

47. Asked on cross as to who was responsible for the "setup," Mrs. Harkavy replied, "I don't know. Intimidation by Mr. Sciacca or the union."

48. According to Mrs. Harkavy, Passannante has indicated an unwillingness to learn a new machine, but she did work the labeling machine and told her (Mrs. Harkavy) that she would "be glad to fill in whatever you need me for."

Q. That you thought, that you testified that in your opinion they were writing letters to you with that language and by registered mail was a set up, instigated by the union, that had nothing to do with your refusal to let them return to work, did it?

A. No, because I have no work to begin with for them.

Secondly, I have never seen any person who seeks employment to signed, write a letter that way and demand a job.

Anyone who is interested in a job calls up, answers an ad or calls up in person, whichever mean they have to seek employment.

This is unheard of, I have never heard of anything like it.

I was taken by this whole thing, for a person to send a registered letter, return receipt requested, 'I demand a job.'

On what basis, on what, on what rights, what are her obligations, what are mine?

How long did they work for me, any of them?

They were all on trial basis, there was not one, one single one of these people you would say they were fully experienced.

They didn't even have a trial period, not even to be completed.

Twelve working days, would you call that a trial period?

JUDGE HERMAN: Don't ask him any questions, just answer the questions.

Q. (By Mr. Weinrich) How long is your normal trial period?

A. I don't have any specifics, I judge each individual case on that person's capabilities.

I would say it would take, normally, between 60 and 90 days that I would say this is a qualified operator.

Q. Well, it was Margaret Passannante that worked for 12 days?

A. Margaret Passannante was a qualified operator from another field in that machine, yes.

She was not an amateur, she sat at that machine as a pro from the first day on.

c. *Moravec*

Moravec wrote as follows to Mrs. Harkavy on July 14:

Dear Mrs. Murray

I am available and ready to report for work right now. Please inform me as soon as possible.

No reply was sent. On June 30, however, Mr. Harkavy had sent Moravec the following letter:

Dear Donna,

Mrs. Murray told me of the telephone conversation you had with her, on or about June 4, 1975, in which you advised her you are going to Adelphi College and that you are not interested in returning to work for us.

We wish you every success in school and your future career.

Mrs. Harkavy testified on direct that around March 1975, Moravec's case worker from Skills Unlimited, who had arranged Moravec's initial hire,[49] contacted her to inquire about the likelihood of Moravec's recall, and she replied that she would call Moravec when work was available, which she did early in June following the recall of Nemec, O'Connell and Cacoperdo; but that Moravec refused, telling her she was taking a full time business course, and she (Mrs. Harkavy) wished her well; that she so advised the Unemployment Insurance Division of the New York State Department of Labor, but that 2 days after the July 14 letter from Moravec she received a letter from the Division stating that Moravec's rejection of employment at that time was for good cause by reason of her having started the schooling in May; that she had meanwhile hired someone to do the separating (Wendolowski) and had enough other employees (including some floor help) who could do that work by the time Moravec's letter of July 14 arrived.

On cross, Mrs. Harkavy testified that she considered Moravec's letter "very much the same thing" as that of Passannante, and continued:

After refusing a job, after going through a position which she wants to better herself and I happened to know Donna Moravec's background, happened to know her mental outlook, her attitude,

49. She apparently had some physical handicap.

when she writes a letter, 'I, Donna Moravec, wish to, am ready, willing and able to return to work.'

It is not Donna Moravec's language.

That is dictated and set up by no one but the union.

d. *White*

White wrote Mrs. Harkavy on July 15, as follows:

Hello Mrs. Murry,

I noticed your ad For Sewing operators in The daily newspaper 'Newsday.' I am Ready, willing & able to work Right Now.

Your immediate reply would be appreciated.

Viewing this letter in the same light as Passannante's and Moravec's, Mrs. Harkavy did not reply to it either, but earlier, on direct examination, she testified that the reason she did not respond was that White was incompetent and had failed to perform adequately on any machine to which she was assigned.[50]

On redirect examination at the October hearing, after testifying that White's incompetency was "the only reason" she was not rehired, and that "[t]here was no other reason," Mrs. Harkavy testified she was breaching a confidence when, on being led by company counsel without objection, she stated that White had "a drinking problem" which was "one of the factors" she took into account in not recalling her. On recross, she testified as follows:

50. She had never been given floor work, however.

Q. (By Mr. Weinrich) The fact that you testified that she had a drinking problem is one of the reasons you did not recall her?

A. That was part of it, yes.

Q. What were the other reasons?

A. Incompetence.

Q. There were only two reasons?

A. Those were the two major reasons, plus not being in touch for nine and a half months at all.

I didn't know if Mary White was even existing.

Q. There were three reasons?

A. Yes.

And if you bring more attention to me, I will find more, but at this point, right now, I can find those three major reasons that I didn't call her back, yes.

First, incompetence, second, which I didn't want to bring up, it was between her and I, confidential, and this not being in touch for nine and a half months.

I find it to be unbelievable for a person who is seeking a job in this day and age, when jobs are hard to get, not to be in touch with an employer and finding out whether there is a job available.

Q. When did you find out about this drinking problem?

A. I believe it was the second week that I employed her, when I was going to release her, at that time, when she was totally incompetent on everything that I tried her, so she pleaded with me.

In rebuttal, White denied any drinking problem, testifying on the contrary that because of a physical ailment

which she has had for over 3 years she has been on medication and a low sugar diet that proscribes liquor in any form.

B. Conclusionary Findings

1. Section 8(a)(1)

a. *The Harkavys' conduct*

On all of the evidence I find that Respondent coerced and restrained its employees in violation of Section 8(a)(1) of the Act. As reflected above, the Union's visit to the plant on October 4 evoked an immediate response in the form of interrogation and threats. Within the hour after Sciacca's departure Mrs. Harkavy called Nemec into her office for questioning as to her union involvement as well as that of the other employees. In this connection I credit the testimony of Nemec who impressed me very favorably as a witness. Not only did I find Mrs. Harkavy substantially less impressive generally, but her account of the incident suggests somewhat less of a concern on her part than seems warranted by the very order to Nemec to report to the office. Moreover, Nemec, who within the next few days signed both the O'Connell letter to the Union and Mr. Harkavy's statement regarding Rugolo's visit to the plant after her layoff, was basically sympathetic to Respondent. In any event, even Mrs. Harkavy's version would not affect the legal result. If the surrounding circumstances would render the interrogation unlawful, the mere fact that it commences with the employee's statement that she supposes that the purpose of the interview is "to see me about the Union" cannot detract from the violation if her surmise is

correct and the employer so admits and proceeds with the interrogation.[51]

Respondent properly urges that since *Blue Flash Express, Inc.*, 109 NLRB 591, interrogation concerning union activity has not been a *per se* violation. Indeed, the cases have gone considerably further despite both the 8(a)(1) proscription of "interference" and the absence, at least since *Aaron Brothers*, 158 NLRB 1077, 1078, of the employer's need, perceived in *Blue Flash* (190 NLRB at 593), to "know whether he was obligated to bargain with the union." However, in order for the interrogation to be lawful it must satisfy the standards set out in *Struksnes Construction Co.*, 165 NLRB 1062. See *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 609. Here, quite apart from the lack of anonymity common to every oral interrogation, and assuming the purpose to have been to determine the validity of the Union's claim, at least three of the *Struksnes* standards were not met: The purpose was not communicated to Nemec; she received no assurances against reprisal;[52] and the interrogation was the prelude to other unfair labor practices commencing that same day. The interrogation of Nemec in these circumstances in the

51. Although I believe that Mrs. Harkavy's testimony that all she asked Nemec was, "what's going on?" was designed to satisfy the second test in *Bourne Co.* v. *N.L.R.B.*, 332 F. 2d 47, 48 (C.A. 2), even that query in the present context succeeded in eliciting information concerning every employee in the unit. And Respondent's reliance on Mrs. Harkavy's occasional use of that same question in connection with routine business (Brief, p. 9) hardly advances Respondent's argument here.

52. Indeed she was cautioned against mentioning the matter to anyone.

privacy of Mrs. Harkavy's office violated Section 8(a)(1). Cf. *Bourne Co.* v. *N.L.R.B., supra.*[53]

Similarly violative was Mrs. Harkavy's asking later that morning, "You girls want the Union?" as Cacoperdo credibly testified;[54] and saying, when no answer was forthcoming, "I see you girls don't want your jobs." If Cacoperdo's denial on cross-examination by Respondent's counsel that Mrs. Harkavy said "anything about the union" on that occasion was intended to mean more than that the statement itself contained no reference to the Union, i.e., if it was intended as a retraction of her testimony on direct, I would discredit it for the reasons indicated in n. 54, *supra,* and for the further reason that Respondent made no effort to ascertain from Cacoperdo what the statement related to if it did not relate to the Union. I give no credence at all to Mrs. Harkavy's own divergent explanations of the statement, noting particularly that her version on direct examination, unlike that on cross, did not even meet the issue since it was a personal statement solely to Cacoperdo rather than to "you girls."

53. Respondent's contention that the truthful answers suggest an atmosphere free of coercion (Brief, p. 9) ignores the fact that the inquiry was broad enough to, and did actually, educe information as to the union desires of all the employees, so that even if Nemac, the most senior girl in the plant, was not frightened, her attitude provides no evidence of the willingness of the others, obviously more vulnerable, to disclose such information.

54. Cacoperdo too was friendly to Respondent and, while testifying, cast frequent darting glances toward Respondent's counsel table. She also signed the O'Connell letter and the statement prepared by Mr. Harkavy on October 10, and her testimony damaging Respondent was not easily extracted from her. While Mrs. Harkavy denied making the threat that followed, she did not specifically deny asking the question.

Mr. Harkavy's speech that noon continued the course of unlawful conduct. I do not credit his testimony that he confined his remarks to a mere prediction of possible consequences in the event that the Union became the bargaining agent, but find in accordance with the great weight of the testimony that he announced he would close in that eventuality or at least that his remarks provided a reasonable basis for such an inference on the part of the employees. Thus White testified that he said "he would close the shop" if the employees "persisted," and she understood the activating factor to be "if we persisted in wanting the union to represent us."[55] According to Cacoperdo, Mr. Harkavy said "he's losing a lot of money and why we girls want the union or he'll have to close down the plant." Gonzales, whom I found a very impressive witness,[56] testified that Mr. Harkavy said that he understood the girls wanted the Union but things were slow and he had lost $15,000 and "he just couldn't afford it right now, he said. 'Think it over', he said, because things were bad. Otherwise he will have to close."[57] Rugolo's account of the statement was

55. Respondent's brief (p. 13) stresses White's inability to recall that Harkavy mentioned the Union in this connection, but suggests no other area of "persist[ence]" as a possible cause of closedown.

56. She also signed Mr. Harkavy's statement of October 10.

57. It is of no avail to Respondent, contrary to its brief (p. 14), that Gonzales testified, when led on cross, that Mr. Harkavy did not "threaten [her] or any other employee about joining the union" when he said Respondent would "be forced to close." Certainly she was not retracting her statement that he said he would "have to close" because he could not afford the Union at that time. There was nothing else for the employees to "think . . . over." I read her testimony, therefore, as meaning only that there was no independent threat against her or other employees—such as a threat to fire—for joining the Union. Indeed, if Respondent is suggesting that Harkavy's statement did not amount to a threat as a matter of law, Gonzales' testimony as to that would clearly be immaterial.

that "he couldn't possibly afford a union, and if we did go union he would have to close shop." Even O'Connell, the forelady-in-training and leader of the defection movement, understood this to be Mr. Harkavy's message although she did not "exactly remember him saying that exact words that if the union came in."[58]

If employees reasonably understand their employer to be threatening closure in the event of a union victory, that suffices to establish a violation of Section 8(a)(1). "The question is not only what the employer intended to imply but also what the employees could reasonably have inferred." *N.L.R.B.* v. *Kaiser Agricultural Chemicals,* 473 F. 2d 374, 381 (C.A. 5). As former Chairman Miller said, dissenting in *Essex Wire Corp.,* 188 NLRB 397, 399, "one who undertakes to speak about such issues must choose his words with care." "An employer who goes so close to the brink takes the risk that employees may honestly misunderstand him." *N.L.R.B.* v. *Rollins Telecasting, Inc.,* 494 F. 2d 80, 82 (C.A. 2). As in *Rollins,* Mr. Harkavy "could easily have avoided the likelihood of being misunderstood by adding that [Respondent] would not close simply because of a [Union] victory but only if the union's demands made continuation impracticable." *Ibid.*[59] See *Gissel, supra,* 395

58. Mrs. Harkavy, though present at the meeting, gave no testimony concerning the speech.

59. In *B. F. Goodrich Footwear Company,* 201 NLRB 353, cited by Respondent as "exactly on point" (Br. p. 16), the Board specifically observed that the statement was not couched in terms of the "inevitable[e]" nor was the closing even "likely" to flow merely from the selection of the union, but rather that the "point" of the statement was that "Respondent could not afford to grant large wage increases and if forced to do so would, in his opinion, cease operations." *Id.* at 354.

U.S. at 618-620. Here, according to Mr. Harkavy's own testimony, his hinging "surviv[al] on the avoidance of "added economic expenses" was couched not in context of the Union's prospective demands but solely in terms of the employees' "decision" or "vote" on their choice of a union.

Although I find Nemec honest and generally credible, her recollection appears faulty in respect to the initiation of her conversation with Mrs. Harkavy at her machine on October 7. If, as General Counsel acknowledges (Brief, p. 34), Mrs. Harkavy had already received a copy of O'Connell's letter and knew that Nemec had signed it, she had no reason to ask Nemec the question. I therefore credit Mrs. Harkavy in this instance and find that Nemec opened the conversation by asking her if she knew that Nemec had signed the letter.[60] Accordingly, I find no unlawful interrogation on that occasion.

Nor do I find a violation in respect to the button incident the following day. Asking an employee whether wearing a button is legal does not, in my opinion, violate the Act.[61] And even if Mrs Harkavy's protest against Rugolo's wearing the button were deemed to consfitute coercion, the effects were dissipated immediately thereafter when the

60. I see no reason however, for Mrs. Harkavy to have been "taken by surprise." Not only did her direct testimony conflict with her cross as to the cause of the surprise, but the cause stated on cross, i.e., what Nemec had told her the previous Friday, made no sense. Obviously, anybody "withdraw[ing her] signature," must have favored the Union earlier. In this connection, Mrs. Harkavy expressed no surprise concerning the change in attitude of the other signers of the letter, nor did she express surprise that her forelady-in-training had joined the Union in the first place.

61. I note that Brown attributed the question to Mrs. Harkavy, while Rugolo said it was put by Mr. Harkavy.

matter was dropped. Cf. *Interlake, Inc.*, 218 NLRB No. 154, JD, at 18-19, and cases there cited.

I find a violation, however, based upon Passannante's testimony that Mr. Harkavy answered her question of October 9 as to when work would be available with the statement, "We'll see when we straighten all this out." Mr. Harkavy "assumed . . . that she was referring to the Union problem," and his response was very similar to O'Connell's threat of October 7, to Cacoperdo.

I find, further, that Mrs. Harkavy unlawfully interrogated Gonzales on October 10 regarding her own union activity as well as that of Rugolo and the other girls; and, based on Mrs. Harkavy's own testimony, that she also unlawfully interrogated Zimmerman.

b. *O'Connell's conduct*

Neither the General Counsel nor the Charging Party contends that O'Connell was a supervisor within the meaning of the Act. They nevertheless urge that Respondent is liable for certain conduct of O'Connell on an agency theory. I find merit to this position. The acts of union-member employees are imputable to their employer if they have close ties with management, as where "they customarily deliver to the employees work instructions from management," particularly where the employer acquiesces in the antiunion efforts. *N.L.R.B.* v. *Dayton Motels, Inc.*, 474 F.2d 328, 331 (C.A. 6). Notwithstanding O'Connell's lack of supervisory status and the fact that she was paid like the other employees,[62] the employees were aware of the special

62. Indeed, as Respondent points out, her hourly rate was 10 cents below Rugolo's.

relationship between her and Mrs. Harkavy and in all the circumstances could reasonably have understood, as Cacoperdo testified, that O'Connell spoke for Mrs. Harkavy in respect to working conditions. Such a belief could only have been fortified by O'Connell's telling her cosigners that she would deliver to Mrs. Harkavy a copy of her letter to Sciacca, as well as by Mrs. Harkavy's statement to Nemec that she had done "the right thing" in signing that letter.

Moreover, O'Connell's explanation for undertaking to write the letter does not stand scrutiny. According to her testimony on direct examination, she had been induced to sign the union card by Sciacca's representation at her home that all the other employees had signed, and she and her husband had drafted the letter of withdrawal because she had thereafter learned at work that such representation had been false. Her husband did not testify. Sciacca's testimony did not mention any such representation. On the contrary, he testified—and she did not deny—that upon signing the card she asked him whether he had yet gotten Cacoperdo's signature and, when he said he had not, she told him how to find Cacoperdo's house. On cross-examination her testimony became even stranger as the nature of the disillusioning misrepresentation shifted, this time as to the purpose of Sciacca's visit, because she had not been expecting a union delegate. Her direct examination in this connection, however, makes clear that any surprise she may have been caused was not Sciacca's fault. Indeed, she testified, "I believe he thought I was expecting him." To talk of "misrepresentation" in this context is absurd. Thus far, then, her testimony comes to varying accusations of misrepresentation, both without substance. In addition, she

conceded on cross that her statement to the Board agent in the course of the investigation contained no reference whatever to any kind of misrepresentation, and that the sole explanation she offered there for the letter was that she had changed her mind about the Union after reflecting that "the boss had been very good to [her]." This was in fact the reason she had given to Nemec, and none of the testimony of any of the cosigners indicates their awareness of any other reason for O'Connell's action. I find that this was the reason for her action. I find further, despite O'Connell's and Mrs. Harkavy's denials, that Mrs. Harkavy had prior knowledge of the letter. I see no other explanation for their testimony concerning O'Connell's delivery of the copy of the letter to Mrs. Harkavy. It passes belief that announcement of such a momentous event as the loss of four members in a unit of 13, in a plant which the Harkavys strongly felt was not ripe for organization and whose organization they otherwise unlawfully opposed, would have occurred utterly without comment, as Mrs. Harkavy testified, or even with the bare comment by O'Connell that "this is a copy of the letter that I sent withdrawing our signatures from the union," as O'Connell testified—unless Mrs. Harkavy was expecting it.[63] And I find, in light of the Harkavys' other unlawful conduct and the sudden shift in O'Connell's sentiments without credible explanation thereof save in her prehearing statement, that Mrs. Harkavy fostered that shift and hence its means of expression.

I do not find any 8(a)(1) conduct based on Moravec's testimony, some of which I found virtually inherently

63. Use of the definite article in "the letter" itself suggests prior knowledge.

incredible, like her statement that she signed O'Connell's letter without reading it and while it was being pulled away from her; as well as her testimony that O'Connell cautioned her in the phone conversation of October 6 not to tell anybody about the letter notwithstanding O'Connell had already mailed it to Sciacca.[64] Accordingly, I do not credit Moravec's testimony concerning other statements by O'Connell.

Other conduct of O'connell's, however, which, in my opinion, is properly attributable to Mrs. Harkavy under *Dayton Motels, supra,* and *Teledyne Dental Products Corp.,* 210 NLRB No. 64, JD pp. 9-10, particularly in view of the Harkavy's own concomitant misconduct, includes:

1. O'Connell's promise to Cacoperdo on their way to work on October 7 (the day Sciacca presumably received their letter of withdrawal and Mrs. Harkavy was given a copy), that "we'll be taken care of, that we'll always have a job and we'll get a raise." Respondent's evidence of the regularity of seasonal general raises fails to explain the promise of permanent employment, and no explanation was offered therefor.[65]

2. O'Connell's threat to Cacaperdo on October 7 that Mrs. Harkavy would take no more orders "until everything is straightened out with the union." Although in respond-

64. I similarly give no credence to Rugolo's testimony that on October 7 O'Connell denied knowledge of the whole matter except that she had written a letter just for herself. O'Connell could not possibly have expected that Rugolo would not learn the truth from Sciacca.

65. Although Mrs. Harkavy denied that she told O'Connell to tell any employees that she would take care of them, she did not deny telling O'Connell that she would.

ing to leading questions on cross, Cacoperdo testified that O'Connell did not say that she had been told by Mrs. Harkavy to make that statement, she was not asked whether O'Connell told her that Mrs. Harkavy had made such a statement to O'Connell. Moreover, Cacoperdo did testify that she at least understood that "Mrs. Murray told her" that. Mrs. Harkavy did not deny making such a statement; and, as indicated above, it is akin to Mrs. Harkavy's statement of October 9 to Passannante.

3. O'Connell's threat to Cacoperdo that if the Union got in Mrs. Harkavy would close the shop, or that Mrs. Harkavy would rather close the shop than have the Union in.[66] Here again, in responding to leading questions on cross, Cacoperdo testified that O'Connell did not say that Mrs. Harkavy had told her to deliver that message. In this instance, however, she did testify, on being led, that O'Connell did not say that Mrs. Harkavy had made the statement. But this contradicted her testimony of a moment before that O'Connell "said that Mrs. Murray had said it, yes." O'Connell admitted telling Cacoperdo that she thought Mrs. Harkavy would rather close than have the Union in but testified that she did not say that Mrs. Harkavy had said so. However, she did admit making the statement, "I have come to understand the bosses believe the shop is not big enough to hold a union" and that "sometimes" other employees were present when Mrs. Harkavy said that. And Mrs. Harkavy, after first emphatically denying that she had "offer[ed] any opinion whatsoever, none whatsoever"

66. The latter version was elicited on cross-examination by Respondent's counsel. I perceive no legal distinction between the two statements. Compare O'Connell's admitted statement to Sciacca, n. 18, *supra*.

to O'Connell about having a union in the shop, and asserting that "If [O'Connell] formulates her own, I can't help it," acknowledged that she had expressed her feeling "that it's too small a place to be organized." In all these circumstances, and recalling particularly Mr. Harkavy's speech of October 4, even if O'Connell did not specifically inform Cacoperdo of her own understanding that "the bosses believe the shop is not big enough to hold a union," I do not deem it unreasonable for Cacoperdo to have gained the impression that O'Connell's statement that the plant would close reflected Respondent's position.

2. Section 8(a)(3)

I find, on the entire record, that Respondent expedited the layoff in question in order to reward its loyal employees and punish the Union's adherents so as to avoid unionization of its plant. That Respondent opposed the organization of its employees as disruptive of the "family" setting there can be little doubt. I have found that to this end Respondent resorted to conduct violative of Section 8(a)(1), including the threatened shutdown of the plant. I now find that it used the layoff as a further tactic in this effort. This is not to dispute Respondent's sound assertion that the Board may not substitute its judgment for an employer's in deciding the best course to pursue in furtherance of his economic goals. It may also be accepted as a corollary that the employer has the privilege of making economic mistakes, so that even a demonstration of poor judgment on his part does not establish the General Counsel's case. It does not follow, however, as urged by Respondent (Brief, pp. 4-5) that "the General Counsel's claim that the 'pace'

of the Company's layoffs was discriminatory would require the Judge to substitute his judgment for that of the Company about the necessity, nature and timing of an economic layoff." After all, the Board's task in an 8(a)(3) case is always to determine the employer's motive. Relevant to that inquiry in the case of a layoff *are* its necessity, nature and timing. The cases are legion in which layoff violations have been found based, for example, on undue expedition or improper selection in terms of the Act's proscriptions. It is appropriate, therefore—indeed it is essential—for the Board to consider the validity of the employer's explanation of his action in order to ascertain the truth of his averred motive.[67]

Respondent here contends (Brief, pp. 2-4) that "the season's end was at hand even before the Union arrived on the scene"; that it had suffered cancellation of "a major in-production order" on September 27; that by the end of September some employees "were being given make-work"; that "Every year, as in 1974, Mrs. Harkavy follows the practice of laying off first the newer hired girls with less time and experience with the Company" because they are "less flexible and less valuable to the Company as the number of employees still working diminishes"; and that "The purely economic basis for the layoffs, the time they occurred, the order in which they occurred, and the period over which they took place, from the first to last, was not shown to be anything other than usual and normal in terms

67. It of course goes without saying that if, as here, Respondent can testify that seniority is the primary factor, subject, however, to competence, versatility and position in the production line, its contention that its determination is beyond the Board's scope of authority would leave Respondent with an absolute and foolproof power entirely incompatible with the objectives of the Act.

of the Company's history and the seasonal nature of its business, and was entirely consistent with the only added new major factor, namely, the disastrous cancellation of the Sweater Bee order in late September."

In my opinion, the record refutes these claims. As indicated above, Mr. Harkavy admitted that until the Sweater Bee cancellation "there was enough work for everybody in that shop to work full time," indeed there was more work in the shop than the employees could effectively handle since "We were unable to effect delivery because we were not able to produce the merchandise on time." And he estimated that there was enough work to keep the plant busy "until sometime in November."[68] Only by ignoring this evidence can Respondent claim that some employees were being given "make-work." Moreover, if this situation changed by the beginning of October it must have been the result of what Respondent now calls "the disastrous cancellation of the Sweater Bee order." In fact Mrs. Harkavy called the cancellation "a major factor" in the layoff. Yet "disastrous" seems an exaggeration for the cancellation of 130-140 dozen sweaters of a total order of over 1000 dozen, particularly in light of Mr. Harkavy's characterization of another order of 75-100 dozen as "a small quantity."[69] In

68. Respondent's witness, Delfino, testified that she took off October 18 to spend with a sick brother because work had slowed down a "little more" since the previous week when she had initially wanted to go, prior to which she "didn't have time."

69. His testimony in this connection was as follows:

> Q. Now, at the time that the Sweater Bee goods were canceled, that wasn't the end of your production run, there were still other materials, other orders that had to be produced?
>
> A. Yes.

(Continued on next page)

any event, the absence of an immediate effect of the cancellation on the need for continued production was manifested by Mr. Harkavy's further testimony, first, that he was still hoping for a rescission of the cancellation and indeed that he did proceed to complete the production of those sweaters, which was accomplished "by the end of November"; and second, that "October was critical" because he was "extremely worried" about the possible cancellation of his Spuncraft order if Spuncraft's expectation of October delivery was not satisfied, and that he did proceed to satisfy it.

The manner of effectuating the layoff lends additional support to the contention that it was unlawfully motivated, particularly in light of the surrounding 8(a)(1) conduct. The first four employees laid off (almost one-third of the work force) were all union members, and their layoffs became effective within a period of 2 days (October 7-8).[70] In contrast, the 1972 and 1973 layoffs commenced at a slower pace, with one or at most two employees being laid off well before the next individual. As noted above, moreover, the initial layoff here took place at a time when Respondent was still quite concerned about meeting its

Q. Had all of those orders been knitted by the end of September, to your knowledge?

A. There was a small quantity involved there, too. I'd say somewhere in the area of 75 dozen, or perhaps a hundred dozen.

In this same connection, O'Connell characterized as "not very large" an order which, for purposes of her testimony, could have amounted to as much as 600 dozen.

70. Although Passannante's last workday was October 3, I credit her testimony that she was to be off the following day to attend a court session and slated to return on Monday, the 7th. See *infra*.

commitment to Spuncraft. Again, the remaining employees here were permitted to work fulltime[71] as contrasted with the earlier layoffs in which more employees were retained until the work ran out with the consequent need to reduce their hours so long as the work lasted.

I do not credit Mrs. Harkavy's position that Passannante was not laid off but that the work for which she had been hired simply ran out. I credit Passannante that her desire for parttime work meant only shorter hours, at least at all relevant times, and that when she left work on October 3, she and Mrs. Harkavy contemplated her returning on the 7th. In light of all the surrounding circumstances, including the testimony that Mrs. Harkavy continued to perform Passannante's job, it would be too strange a coincidence that her work ran out at the precise time that she had to appear in court. I have no doubt, in view of the small size of the plant and Mrs. Harkavy's belief that the older employees shared her view of the inappropriateness of its unionization, that she either knew or suspected the identity of the union adherents, and that it was not until after the Union's bargaining demand on October 4 that Mrs. Harkavy decided against Passannante's return.

Furthermore, Mrs. Harkavy's account of the order of layoff did not quite fit the actual event—a particularly strange phenomenon if, as Respondent argues, the layoff comported "from first to last" with its "usual and normal" practice followed "[e]very year." According to Mrs. Harkavy's testimony, Moravec "ha[d] to be" laid off first, despite her seniority, the primary criterion, and White "ha[d] to be" second. Moreover, she gave a detailed

71. As Mrs. Harkavy testified, to give the older—nonunion—employees "a full day's work."

explanation for this order in terms of her alleged criteria, at one point responding affirmatively to her own counsel's probing as to whether she was "absolutely certain"; clinging to her story even after her error was pointed out; and, after conceding the accuracy of the payroll records and examining the records showing White's layoff a day before Moravec's, insisting that they were laid off "the same day." In my opinion, such stubborn adherence to error seriously affects her overall credibility.

I specifically discredit Mrs. Harkavy's testimony that it had somehow slipped her mind to lay Moravec off on October 7 so as to explain the sudden unavailability of work for her the following morning. I believe Moravec was first in Mrs. Harkavy's mind because, as one of the older employees who should have been loyal and who therefore had been one of those solicited to join in O'Connell's letter, Moravec had proved perfidious by participating in the button incident that very morning. I am also satisfied that Rugolo's participation in the same incident served to remind Mrs. Harkavy of her strong union inclinations and that this led to her layoff the same day. Mrs. Harkavy's testimony that only Gonzales was capable of performing the remaining merrowing work, and that Rugolo could not even learn it, so that there was no work for Rugolo even despite Gonzales' absence that day and the next day, overlooks at least two points: First, since the end of her first week on the job Rugolo had been receiving the same pay as Gonzales, the highest rate given a machine operator, and I specifically discredit Mrs. Harkavy's statement that she was paid this rate just to give her confidence because this would hardly have been in keeping with any practice of

Respondent revealed by the record; and second, the Company records disclose that Rugolo had worked on more expensive and more detailed garments than the ones Mrs. Harkavy said she was incapable of handling.

These conclusions are fortified by the October testimony which, in my opinion, also establishes that the original unlawful motive has persisted so as to bar the reemployment of these individuals. Thus, in respect to Rugolo, Mrs. Harkavy attempted to link the alleged lack of work with the alleged name-calling incident now mentioned for the first time. I credit Rugolo's denial that there was any name-calling whatever.[72] In view of the extreme indignation manifested by Mrs. Harkavy's outburst on the witness stand a full year after the alleged incident, I find it impossible to believe that she would not have given vent thereto at the time it occurred. Cf. *N.L.R.B.* v. *Smith Victory Corporation,* 190 F. 2d 56, 57 (C.A. 2). Nor, if the incident occurred at all, could it have been as serious as is now urged in light of her further testimony that her husband, though prodded by her to challenge Rugolo's presence at the plant 2 days later because of the incident, still told Rugolo that she was merely laid off and not terminated. *Ibid.* Indeed, Mrs. Harkavy's October testimony that Rugolo's abuse of her husband on that occasion was something she would "not take from anybody, in any place, in

72. I note in this connection Respondent's failure to subpoena Nemec, O'Connell or Cacoperdo to testify notwithstanding Mrs. Harkavy's testimony that they all witnessed her conversation with Rugolo. Unlike Brown who, though placed at the scene by both Rugolo and Mrs. Harkavy, no longer works there, the other three are still employed by Respondent and are friendly to Respondent, O'Connell in particular having testified for Respondent at the February hearing.

any course" appears to offer still another reason for rejecting Rugolo, going even beyond her written reply to Rugolo's recall request. This shift of position and steady multiplication of grounds themselves suggest the insubstantiality of the defense. *N.L.R.B.* v. *Schill Steel Products, Inc.* 340 F. 2d 568, 573 (C.A. 5).

And Respondent's position becomes even more untenable by the suggestion in its brief (pp. 5, 11) that yet another reason underlay Rugolo's rejection, to wit, the unavailability of work because the merrow machine "is being operated by Anna Nemec, Josie Maltaghati and Carmella Cacoperdo, employees with more seniority and greater diversity than Ms. Rugolo who was merely a 'satisfactory' Merrow operator." As indicated above, notwithstanding Mrs. Harkavy's grudging concession that Rugolo was merely "satisfactory," the weight of the evidence points to her experienced competence. The fact is that of the three currently doing that work,[73] only Maltaghati who had left prior to the last layoff, apparently because of illness, had comparable experience.[74] Nemec testified in February that although she worked the merrow machine "from time to time," she "didn't have that much experience on it." And Cacoperdo, who testified in February that she had been

73. There is evidently an abundance of merrowing work requiring the use of more than a single merrow machine. In context, I read Mrs. Harkavy's reference to "just one machine . . . that is merrow" as meaning one *type* of machine because immediately after that statement she replied affirmatively to the question whether Respondent was "only using merrow machines now." During the last season, at least two such machines were used simultaneously, by Rugolo and Gonzales.

74. Maltagheti's hourly rate was no greater than Rugolo's had been the year before although every laid-off employee who had been recalled was given a higher rate than she had had the previous season.

hired to do trimming and had done that type of work throughout her employment, was recalled, according to Mrs. Harkavy, only as "floor help, trimmer, separator and all other phases on the floor, whatever is essential to floor help." The very suggestion that a floor employee could be more competent than one who performed even only "satisfactor[il]y" at "the most complicated [and "the most intricate"] machine in our plant" sounds in desperation.

As for *Passannante,* I am unable to reconcile Mrs. Harkavy's professed willingness to recall this admittedly "excellent operator" if work were available with her "outrage" at what she felt was a union "setup" which had resulted in her "absolute refus[al] to go into it [Passannante's alleged "demand" for a job] beyond that point" and her refusal even to respond to the letter. Indeed, to the extent that Mrs. Harkavy testified she had no obligation towards the three employees who had failed to "keep in touch," because they were "all on trial basis" ("Twelve working days, would you call that a trial period?"), the only 12-day employee involved was Passannante whose qualifications were not at all in doubt and whom she declared she was willing to recall.

If Mrs. Harkavy's "outrage" was not altogether feigned, I find it stemmed from her concern over what she felt was the Union's involvement. I do not believe that lack of work was even one of the reasons for failing to respond to Passannante. The explanation offered for the advertising search for Singer operators deserves no credence. Surely the nature of Respondent's business could more clearly have been indicated by a forthright description like "sweater manufacturer" or "knitwear manufacturer" than

by specifying jobs which would as well have indicated other branches of the garment industry and for which no applicant was needed. In any event, the specification of merrow operators who, as far as Mrs. Harkavy knew, may not work in other areas of the garment industry, would certainly have sufficed. If the specification of Singer operators in the early ads had indeed been necessary to avoid responses from "floor waxers," e.g., why did it become less necessary by the time of the September 26 ad? It is no answer to say, as Mrs. Harkavy did, that she leaves the ads to the advertising agency, because she also testified that she changes and rewords the ads to suit her needs. Nor does her other asserted reason stand any better, for if there is value in a wider response than is needed so as to ascertain whether the applicant has multiple skills, I see no reason to limit the unneeded skills in the ad to Singer operators to the exclusion of other skills like Mauser operators, cutters, etc. And again, why was it less necessary by September 26?

The fact is, as Mrs. Harkavy admitted, that "there are occasions" for use of the Singer machine. This is consistent with the magazine article describing Respondent's current operation as including the use of Singer and Mauser machines. It is consistent also with the fact that Respondent still has on its payroll two new operators other than Maltaghati (Cerritos, hired July 11, and Gasperi, hired August 18) neither of whom does merrowing, as well as O'Connell who is being trained on the "sewing machine." And even if no Singer work was available, Passannante had expressed to Mrs. Harkavy her readiness to work "in whatever you need me for," precisely the kind of answer Mrs. Harkavy claims to have been seeking in her intensive advertising campaign. Absent evidence to contradict Mrs.

Harkavy's testimony that Respondent's usual practice, on resuming production after a layoff, is not to recall the laid-off employees in the absence of notification of their availability and interest in returning, and in view of the employee's testimony that they were told to "keep in touch," I find no violation in any failure to recall prior to receipt of the written request therefor. By the same token, however, I see no reason why the failure to keep in touch should so have antagonized and "outraged" Mrs. Harkavy as to constitute a basis for utterly ignoring an admittedly "excellent" employee like Passannante at a time when Respondent was experiencing difficulty in obtaining qualified applicants and was offering to train new employees.

I am satisfied that *White* was not the most efficient operator. Yet despite her failings, which Mrs. Harkavy testified were apparent from the outset, she was nevertheless retained for about a month until her layoff for lack of work, not incompetence. I do not credit Mrs. Harkavy's testimony that it was simply compassion that moved White's retention in the face of the alleged drinking problem, which emerged on redirect examination for the first time. If that was the case, it is difficult to understand why White was not transferred to the unskilled or lesser skilled floor work where she would not have been able to cause the damage that Mrs. Harkavy attributes to her. Nor do I believe, in the face of Mrs. Harkavy's repeated testimony that incompetence was the sole reason for refusing to reemploy White, that the alleged drinking problem also motivated that refusal. Indeed, as in the case of Rugolo, further cross-examination elicited another reason, this time "not being in touch for nine and a half months at all," to

which Mrs. Harkavy gratuitously added that with a greater effort she would "find more" reasons. Certainly compassion provided no explanation for the failure to mention these additional reasons earlier, yet no other explanation is offered for their delayed announcement. And if Mrs. Harkavy's asserted distaste for hurting her employees' feelings caused her to refrain from replying to White's letter and thus enabled her to avoid calling White incompetent or a drunkard, no such explanation is available for failing to reply to White with a rejection based on White's neglect to "keep in touch." I credit White's denial of a drinking problem, and find that the failure to answer her letter resulted, as in Passannante's and Moravec's cases, from Mrs. Harkavy's belief that the letter had been "dictated and set up by no one but the union." The refusal even to consider a request for reinstatement just for that reason is plainly in derogation of Section 7 rights and violative of Section 8(a)(3).

Moravec's case differs from Passannante's and White's in that she was offered a job early in June which she declined because she was attending school; and a separator (Wendolowski) was thereafter hired who, Respondent claims, together with several senior employees (including floor help) who filled in, sufficed to perform the separating work (Brief p. 7). Despite its surface appeal, the contention will not stand scrutiny. Moravec's loyalties had not been constant, as the factual recital shows, *supra*. Thus, Mrs. Harkavy had no reason to believe, when Moravec's inquiry in March was conveyed through her case worker, that her fidelity to the Union was still intact; and she made the offer in June which Moravec rejected. When con-

fronted, however, with the July 14 letter which Mrs. Harkavy decided had been "dictated and set up by no one but the union," I believe the facts establish that Mrs. Harkavy became convinced that her prior offer to Moravec had been an error. Moravec's letter was received by Respondent on July 16. Just 5 days later, Respondent hired Maenza, a floor worker, without contacting Moravec. Wendolowski's last day of work was August 1. Respondent did not hire another separator as such until August 11 when Behnke was put to work. It is fair to assume that in the meantime the separating work was continuing and the need for a fulltime separator persisted. It seems too unlikely for credence, therefore, that Respondent would not have contacted Moravec as part of its ongoing search in order to ascertain whether her letter signified a change in her school situation—unless it did not want her back. And on the instant record, the reason for not wanting her back could only have been her connection with the Union.

I accordingly find that Respondent discriminated against Passannante, White, Moravec and Rugolo in violation of Section 8(a)(3) of the Act.[75] The General Counsel, but not the Union, contends further that since the facts establish a layoff which, but for its unlawful expedition, would not have occurred until November, any other employee laid off in October was similarly a victim of Respondent's violation, and that this includes Delfino and Zimmerman. While I

75. Neither the General Counsel nor the Charging Party has challenged my dismissal of the 8(a)(4) allegation at the hearing based upon my agreement with Respondent that an 8(a)(4) finding, absent evidence specifically relating the discrimination found to the giving of testimony, would render any 8(a)(3) conduct after a hearing also a violation of Section 8(a)(4) *ipso facto*. This cannot be the law.

agree that the record, and particularly Mr. Harkavy's testimony, supports a finding that the layoff would not have occurred until November, and that technically perhaps Delfino and Zimmerman qualify as discriminatees, I see no indication that either of these individuals is interested in prosecuting this proceeding or desires the usual remedy, and I believe that the remedial purposes of the Act would amply be served in the circumstances by confining the usual remedy to the other individuals named.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by interrogating, threatening and promising benefits to its employees in connection with their union activities, and by circulating a petition of defection from the Union.

4. Respondent has violated Section 8(a)(3) of the Act by prematurely laying off and thereafter denying reemployment to Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo because of their support for the Union.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act by Mrs. Harkavy's conversation with Nemec at her machine on October 7 or by the button incident on October 8, or by any conversations

between Moravec and O'Connell; nor did Respondent violate Section 8(a)(4).

The Remedy

In order to remedy the unfair labor practices found herein, my recommended Order will require Respondent to cease and desist therefrom and, in view of the serious nature and variety of the violations and the likelihood of their recurrence, from infringing upon the Section 7 rights of its employees in any other manner. Moreover, in order to effectuate the policies of the Act my recommended Order will require Respondent to offer immediate rehire to Margaret Passannante, Mary White, Donna Moravec and Grace Rugolo; and to make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to that which she would have earned from the date of her layoff to October 31, 1974, and from the date she would have been rehired in the absence of the discrimination found to the date of receipt of a valid offer of rehire, less net earnings during such periods, with interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. Rehire shall be to each employee's former position, or, if that job no longer exists, to a substantially equivalent position, or, if no such job is available at the time of the offer, to any job the employee can fill until such time as her former or substantially equivalent position becomes available, without prejudice to her seniority or other rights and privileges.

My recommended Order will further require Respondent, upon the Union's request, to bargain collectively and in good faith with the Union in the unit alleged in the com-

Decision and Proposed Order of the Administrative Law Judge

plaint, in accordance with *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, because I find Respondent's unfair labor practices so extensive and serious as to render impossible or at least unlikely the holding of a fair and free election. See *N.L.R.B.* v. *General Stencils, Inc.*, 438 F.2d 894, 902 (C.A. 2). Even absent the 8(a)(3) violation I would find the 8(a)(1) conduct, particularly Mr. Harkavy's speech, sufficient to support a bargaining order in such a small unit where the unfair labor practices need affect very few employees in order to foreclose a fair and free election.[76] However, contrary to the Charging Party, I see no warrant for relief beyond the Board's usual remedies.

Upon the foregoing findings of fact and conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby recommend the following:[77]

76. Respondent makes no mention in its brief, and has evidently abandoned its positions advanced at the February hearing, concerning (1) the sufficiency of the authorization cards, which I would find sufficient in any event; and (2) the adequacy of the bargaining demand which, again, I would find satisfactory but which is irrelevant in any event in the absence of any 8(a)(5) contention. *Steel-Fab, Inc.*, 212 NLRB No. 25; *Uniflex Rubber Corporation*, 216 NLRB No. 102. n. 1.

77. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Order

Respondent, Solboro Knitting Mills, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating any of its employees concerning their union activities, views or sympathies, or those of their fellows.

(b)Threatening any of its employees with loss of jobs or plant closing or withholding of work if they choose Local 107, International Ladies' Garment Workers Union, AFL-CIO (the Union), or any other labor organization as their bargaining representative.

(c) Promising benefits to any of its employees to undermine their support for the Union or any other labor organization.

(d) Soliciting any of its employees to withdraw from the Union or any other labor organization.

(e) Laying off, denying rehire to, or otherwise discriminating against any of its employees because of their union activities.

(f) In any other manner interfering with, restraining or coercing any of its employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer rehire to and make whole Margaret Passannante, Mary White, Donna Moravec and

Grace Rugolo for any loss of pay suffered by reason of their premature layoff and denial of rehire in the manner set forth in the section of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, as well as all other records necessary to analyze and compute the amount of backpay due hereunder.

(c) Upon request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the following appropriate unit, and embody in a signed agreement any understanding reached:

> All production and maintenance employees of Respondent, employed at its Oakdale plant, exclusive of office clericals, guards and supervisors as defined in Section 2(11) of the Act.

(d) Post at its place of busiess in Oakdale, New York, copies of the attached notice marked "Appendix."[78] Copies of said notice, on forms provided by

78. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the Regional Director of Region 29, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent, upon receipt thereof, and be maintained by it for a period of 60 days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D. C.

IRVING M. HERMAN
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL
LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERMENT

WE WILL NOT coercively question any of our employees about their union activities, views or sympathies.

WE WILL NOT threaten any of our employees with loss of jobs or closing the plant or withholding work to avoid unionization.

WE WILL NOT promise benefits to any of our employees to undermine their support for any union.

WE WILL NOT solicit any of our employees to withdraw from any union.

WE WILL NOT lay off, deny rehire to, or otherwise discriminate against any of our employees because of union activity.

WE WILL NOT interfere in any other way with our employees' exercise of their rights under the National Labor Relations Act.

WE WILL rehire and make whole MARGARET PASSANNANTE, MARY WHITE, DONNA MORAVEC and GRACE RUGOLO for any loss of pay they may have suffered by reason of our discrimination against them.

WE WILL bargain collectively and in good faith with LOCAL 107, INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO, as the exclusive representative of our employees, in respect to rates of pay, wages, hours, and other terms and conditions of employment.

SOLBORO KNITTING MILLS, INC.

Dated_____ By_____
(Representative) (Title)

**THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street—4th Floor, Brooklyn, NY, 11241 (Tel. No. 212—596-5386).

Supreme Court, U.S.
FILED
SEP 5 1978
MICHAEL RODAK, JR., CLERK

No. 78-132

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOLBORO KNITTING MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 572 F. 2d 936. The decision and order of the National Labor Relations Board (Pet. App. 28a-133a) are reported at 227 NLRB 738.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-27a) was entered on April 25, 1978. The petition

for a writ of certiorari was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that a non-supervisory employee's coercive actions were attributable to petitioner and thus violative of Section 8(a)(1) of the National Labor Relations Act.

2. Whether substantial evidence supports the Board's finding that a bargaining order was the proper remedy for petitioner's violations of Section 8(a)(1) and (3) of the Act.

3. Whether the Board properly found, in the circumstances of this case, that petitioner's refusal to bargain with the Union violated Section 8(a)(5) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 3-5.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), on the following facts:

Petitioner is managed by Murray and Rita Harkavy, who are, respectively, its president and secretary-

treasurer (Pet. App. 49a-50a). On or about October 4, 1974, representatives of Local 107, International Ladies' Garment Workers' Union, AFL-CIO (herein, "the Union"), having received authorization cards from nine of petitioner's thirteen employees, approached the Harkavys and requested recognition for the Union as the employees' bargaining agent, offering to present evidence of its majority support. Mr. Harkavy suggested that the Union make a written request. The Union representatives sent a mailgram the same day repeating their request, but never received a reply. (Pet. App. 50a-51a; C.A. App. 81-89, 91, 281-285, 334-335.)[1]

Within minutes after the Union representatives left the plant, Mrs. Harkavy called employee Ana Nemec into her office and interrogated her about the workers' union activities (Pet. App. 51a, 102a; C.A. App. 453-455). Mrs. Harkavy then approached a group of employees; when none responded to her question as to whether they wanted the Union, she said, "I see you girls don't want your jobs" (Pet. App. 52a, 104a; C.A. App. 500-502). That same day, Mr. Harkavy called a meeting of the employees and told them that if they persisted in their desire for Union representation, the plant would be closed (Pet. App. 54a, 105a-106a; C.A. App. 405-406, 531-533, 621-622).

Employee Josephine O'Connell had a "special relationship" with Mrs. Harkavy, and was viewed by

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[1] "C.A. App." refers to the joint appendix to the briefs of the parties in the court of appeals.

the other employees as her spokeswoman; O'Connell relayed instructions from and questions to Mrs. Harkavy, gave out work, and substituted for the Harkavys in their absence (Pet. App. 59a-61a, 108a-109a; C.A. App. 509-514, 716-720, 751-977). The day after the Union's recognition request, O'Connell drafted and signed a letter to the Union withdrawing her authorization and subsequently secured the signatures of three other employees, telling them that she was going to give Mrs. Harkavy a copy.[2] O'Connell also told one of the signers that a raise would be given when work improved, but that no more work would be taken in "until everything is straightened out with the Union," adding that Mrs. Harkavy would "rather close the shop than have the union in." (Pet. App. 61a-66a, 111a-112a; C.A. App. 188, 456-457, 492-499, 508-509, 514-515, 521-522, 735-739, 771-775, 974.)

Following the Union's recognition request on Friday, October 4, petitioner laid off employee Margaret Passannante, although she had been told the day before that she should continue working on Monday (Pet. App. 74a; C.A. App. 346-347, 361). That Monday, October 7, employee Mary White was laid off (Pet. App. 76a-78a; C.A. App. 408, 411, 413). The next morning, employees Grace Rugolo and Donna Moravec, joined by Passannante, White, employee Joyce Brown, and two Union agents, distributed

[2] Mrs. Harkavy subsequently told Nemec that she had done the "right thing" in signing the letter (Pet. App. 9a, 109a; C.A. App. 456-458).

leaflets and Union buttons at the plant driveway. Over Mrs. Harkavy's objection, Rugolo, Moravec, and Brown wore the Union buttons in the shop. Later that day Rugulo and Moravec were laid off. (Pet. App. 70a-71a, 78a-82a; C.A. App. 90, 287-293, 333-338, 367, 419-420, 534-535, 589-593, 657-664.) Mrs. Harkavy engaged in further interrogations of employees on October 9 and 10 (Pet. App. 71a-73a; C.A. App. 623-628, 970).

By the end of November, petitioner's fall season had ended, and the remaining employees were laid off (Pet. App. 86a; C.A. App. 219-235). However, when the next season began the following spring, petitioner refused to recall Rugulo, Moravec, White, and Passannante, although a total of thirteen new employees were hired and it was petitioner's practice to give previous employees the opportunity to return (Pet. App. 88a-102a, 124a-125a; C.A. App. 152-187, 1022, 1030-1040).

2. The Board, affirming the decision of the administrative law judge, concluded that, following the Union's request for recognition, petitioner embarked "upon a course of unfair labor practices designed to destroy the Union's majority status and preclude the holding of a fair election" (Pet. App. 30a). These unfair labor practices included coercive interrogation of employees concerning their and others' Union activities, actual and implied threats of reprisals for their Union support, promises of benefits to employees to enlist their aid against the Union, and circulation of a petition of defection from the Union, all

in violation of Section 8(a)(1) of the Act; and the premature lay-off and subsequent refusal to recall four employees because of their support for the Union in violation of Section 8(a)(3) (Pet. App. 28a-30a).

Moreover, the Board found these "unfair labor practices so extensive and serious as to render impossible or at least unlikely the holding of a fair and free election" (Pet. App. 128a). Therefore, in addition to requiring reinstatement with backpay of those prematurely laid off and the posting of appropriate notices, the Board, noting that at the time the Union requested recognition it possessed valid authorization cards of a clear majority of the unit (*id.* at n. 76), ordered petitioner to bargain with the Union as representative of its employees. In so doing, the Board explained that, even in the absence of the violations of Section 8(a)(3) of the Act, the other unlawful conduct ("particularly" petitioner's owner's speech in which he threatened to close the plant if a union came in) was "sufficient to support a bargaining order in such a small unit where the unfair labor practices need affect very few employees in order to foreclose a fair and free election." (Pet. App. 128a.)

Although the complaint did not in terms allege a violation of Section 8(a)(5), the Board also found that petitioner's behavior following its refusal to bargain with the Union violated Section 8(a)(5) of the Act. That finding was authorized, the Board stated, because the "conduct supportive of [the] 8(a)(5)

finding [was] fully litigated in the course of establishing [the] 8(a)(1) violation" (Pet. App. 29a).[3]

3. The court of appeals enforced the Board's order with modifications not relevant here. (Pet. App. 1a-23a.)[4] The court found that "substantial evidence supports th[e] findings" that petitioner engaged in activity violative of Sections 8(a)(1) and (3) of the Act (Pet. App. 5a). Moreover, the court specifically concluded that substantial evidence supported the Board's conclusion that O'Connell's actions fell within the rule of *National Labor Relations Board* v. *Dayton Motels, Inc.*, 474 F. 2d 328, 331 (C.A. 6), "in which it was held that the acts of non-supervisory employees can be imputed to the employer if the employees in question have close ties with management, as where they 'customarily [deliver] to other employees work instructions from management,' and particularly where the employer acquiesces in the anti-union efforts of the employee-agent" (Pet. App. 9a).

The court also upheld the Board's bargaining order, noting (Pet. App. 16a) that, "[a]s required by [*National Labor Relations Board* v.] *Gissel*, [395 U.S. 575] and by *NLRB* v. *General Stencils, Inc.*, 438 F. 2d 894 (2d Cir. 1971), reasons were given for rec-

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[3] Member Penello and Walther dissented in part, disagreeing with the majority's modification, not relevant here, of the administrative law judge's conclusions regarding the backpay period.

[4] The court modified the Board's order to comport with the views of the administrative law judge and dissenting Board members regarding the backpay period (Pet. App. 18a-23a).

ommending the order in this case: the ALJ found that, even absent the section 8(a)(3) violations, the section 8(a)(1) conduct—particularly Mr. Harkavy's 'speech' to the employees threatening them with the plant closure—was sufficient in this case to support a bargaining order since the unit is small, and unfair practices 'need affect very few employees in order to foreclose a fair and free election.'" The court further stated its view "that the bargaining order can be sustained even without attribution of O'Connell's conduct to the Harkavys" (Pet. App. 9a).

Finally, the court of appeals sustained the Board's ruling that, although no Section 8(a)(5) violation had been alleged, petitioner's refusal to bargain violated that provision since "the complaint *had* alleged [its] failure to recognize and bargain with the union as a violation of section 8(a)(1)" (Pet. App. 16a), noting that "the matter of a proper demand for bargaining was fully litigated" (Pet. App. 17a).

ARGUMENT

1. Petitioner contends (Pet. 18-21) that the court of appeals erred in finding that substantial evidence supported the Board's conclusion that O'Connell's actions were attributable to petitioner. That question raises only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as shown in the Statement, *supra*, pp. 3-4, there was ample evidence that O'Connell

was accurately viewed as a spokeswoman for management.

There is no merit to petitioner's further contention (Pet. 19-20) that assuming *arguendo* the accuracy of the Board's portrayal of O'Connell's relationship to management, that nexus was insufficient to attribute her actions to petitioner. The cases relied on by petitioner do not support its position. In *National Labor Relations Board* v. *Sayers Printing Co.*, 453 F. 2d 810, 817 (C.A. 8), the court rejected the Board's finding that the two employees in question were supervisors and found no "evidence that would show [they] acted at the request or direction of management." Here, on the other hand, the Board found (Pet. App. 110a) that Mrs. Harkavy actually "fostered" O'Connell's anti-union activity. The Board cases relied on by petitioner are similarly distinguishable.[5] The cited cases create no conflict with the

[5] In *Redwood Construction Co., Inc.*, 192 NLRB 15, 18, the Board found no "probative evidence of * * * [employer] knowledge" of the activities of the employees alleged to be acting in its behalf. In *Western Sample Book and Printing Co.*, 209 NLRB 384, 385, n. 1, the Board rejected the contention that an employee's actions were attributable to his employer, concluding, *inter alia*, that he "was [not] closely allied with management" and the employees were not led to believe he was acting for management. In *Paoli Chair Co., Inc.*, 213 NLRB 909, 910, 918-919, and *Rowand Co., Inc.*, 210 NLRB 95, 96, 115, the imputation of the employee's conduct to the employer was based solely on the allegation that he was a supervisor—an allegation which the Board rejected. And in *Stewart & Stevenson Services, Inc.*, 164 NLRB 741, 742-743, the Board found no evidence that the employer had "authorized or ratified" the conduct in question rejecting the assertion that the employer had "approved or condoned * * * and later sought solace [in]" it.

standard applied by the court of appeals as enunciated in *Dayton Motels, supra*, p. 7.[6]

2. Petitioner further contends (Pet. 12-15) that the decision of the court of appeals upholding the Board's bargaining order conflicts with *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, and cases in the Third, Fourth, Fifth, and Seventh Circuits, in that the Board here did not explain why the unfair labor practices created a situation in which a free and fair election was unlikely. But the fact is that, as the court recognized (Pet. App. 15a-17a), the Board *did* stress the extent of management's unlawful activities and the small size of the unit in concluding that the holding of a fair election was "impossible or at least unlikely" (Pet. App. 128a). Thus, the decisions below were fully consistent with *Gissel*, where this Court ruled (395 U.S. at 614):

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The other cases cited by petitioner are factually distinguishable. In *National Labor Relations Board*

[6] In any event, since the court expressly held the bargaining order to be sustainable without reliance on O'Connell's conduct, the Board's order would stand even if petitioner's arguments on this point were well-founded.

v. *Armcor Industries, Inc.*, 535 F. 2d 239, 245 (C.A. 3), a panel of the Third Circuit remanded the case to the Board to "make 'specific findings' as to the impact of the unfair labor practices on the election process and clearly explicate the basis for its decision to issue a bargaining order." Here, of course, such findings and explication were made. In any event, *Armcor* is not currently law in the Third Circuit, the judgment having been vacated and listed for rehearing *in banc* (see order of Third Circuit dated July 10, 1978, No. 77-1495). In *Shulman's, Inc. of Norfolk* v. *National Labor Relations Board*, 519 F. 2d 498 (C.A. 4), the Fourth Circuit ruled, as a factual matter, that "the result of the assumed violations of the Act * * * was not so permanent or pervasive as to infuse union hostility into a subsequent campaign" (*id.* at 501), particularly where the principal perpetrator of the alleged unfair labor practices had left the company's employ (*id.* at 500). Here, the court of appeals reached a different conclusion on different facts; significantly, in the case at bar, the management group remained unchanged. In *National Labor Relations Board* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (C.A. 5), certiorari denied, 400 U.S. 957, enforcement of a bargaining order was denied by the Fifth Circuit where the Board refused to consider evidence "that a complete turnover in employees and the departure of the only management official involved in the unfair labor practices made a free election possible at that time" (*id.* at 448), and the Board's decision was issued four years after the un-

fair labor practices occurred. Here, in contrast, the record showed that many employees returned year after year (Pet. App. 88a-89a), and, indeed, four of the thirteen were awaiting reinstatement under the Board's order; the perpetrators of the illegal activities remained; and about a year and a half separated the last of the unfair labor practices (refusals in late spring and early summer, 1975, to reinstate those prematurely laid off (Pet. App. 87a-92a)) and the issuance of the Board's order in January, 1977.[7] Finally, the Seventh Circuit cases cited by petitioner —*Peerless of America, Inc.* v. *National Labor Relations Board*, 484 F. 2d 1108, 1120, and *National Labor Relations Board* v. *Gruber's Super Market, Inc.*, 501 F. 2d 697, 701-705—involved "marginal" or "equivocal" violations of Section 8(a)(1) and insufficient Board explanation as to why those alleged violations warranted bargaining orders.

In sum, the Board's bargaining order, enforced by the court of appeals, is plainly proper and consistent

[7] In *National Labor Relations Board* v. *Gibson Products Co.*, 494 F. 2d 762, 766 n. 4 (C.A. 5), the Fifth Circuit explained that the *American Cable* case

> is not an invitation to wholesale experimentation with delay. It does not require a court reviewing a second category bargaining order to reconsider electoral conditions as of the date enforcement is sought. Nor does it authorize the court to remand a case to the Board merely to update the record on appeal to take into account events subsequent to the Board's action.

In *Gibson*, enforcement of a bargaining order was denied where the Board admitted that the unfair labor practices would *not* have an impact on an election (*id.* at 765).

with all relevant precedent. It creates no conflict among the circuits. The case simply involves the question whether substantial evidence supports the Board's order, an issue not appropriate for review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board, supra*, 340 U.S. at 490-491.

3. Finally, there is no merit to petitioner's contention (Pet. 15-18) that since no violation of Section 8(a)(5) was alleged in the complaint, the court of appeals improperly sustained the Board's finding of such a violation. In approving the Board's Section 8(a)(5) finding, the court found that the underlying issues were "fully litigated" (Pet. App. 17a). As the court pointed out, the complaint had alleged a failure to recognize and bargain with the Union as a component of the Section 8(a)(1) violation and therefore "gave full notice of the claim of misconduct" (Pet. App. 17a). The court went on to explain that there was no denial of due process because the complaint informed petitioner " 'of the acts which constitute[d] the charged unlawful behavior and [petitioner was] given an opportunity to respond,' " citing *National Labor Relations Board* v. *Scenic Sportswear*, 475 F. 2d 1226, 1227 (C.A. 6) (Pet. App. 17a).[8]

Contrary to petitioner's assertion, the Eighth Circuit's decision in *Drug Package, Inc.* v. *National Labor Relations Board*, 570 F. 2d 1340, does not con-

[8] Indeed, the administrative law judge specifically rejected arguments made by petitioner "concerning (1) the sufficiency of the authorization cards * * * and (2) the adequacy of the bargaining demand * * *" (Pet. App. 128a, n. 76).

flict with the instant case. There, the court "recognized the Board's power to decide an issue that has been fairly and fully tried by the parties, despite the fact that the issue was not specifically pleaded" (*id.* at 1345). The court simply found that on the facts of that case the principle should not be applied because there the additional finding of a Section 8(a)(5) violation meant that striking employees would be entitled to reinstatement and backpay to which they would not otherwise have a right (*ibid.*). In the case at bar, on the other hand, no additional remedies flowed from the Section 8(a)(5) finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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